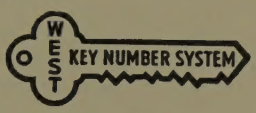
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CALIFORNIA REPORTER

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53 P.2d – 54 P.2d

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CALIFORNIA REPORTER

IN VOLUME

53 PACIFIC REPORTER

SECOND SERIES

4 Cal.2d 731

ADAMS v. SOUTHERN PAC. CO. et al.

Civ. 1530.

L. A. 15398.

Supreme Court of California.

Dec. 23, 1935.

1. Automobiles ⇐306(2)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, evidence that county's failure to erect barrier or warning sign near crossing created dangerous condition because paving was narrower over crossing than was highway immediately adjacent to crossing *held* to support finding that county was negligent (Gen. Laws 1931, Act 5619, § 2).

2. Automobiles ⇐306(8)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, evidence *held* insufficient to require finding that motorist was contributorily negligent in failing to see projecting rails as he approached crossing during nighttime (Gen. Laws 1931, Act 5619, § 2).

3. Automobiles ⇐304(3)

Motorist is presumed to employ ordinary care for his own safety.

4. Automobiles ⇐304(2)

In action against county for death when driver was thrown from automobile which ran into projecting rails at railroad crossing, occurrence of accident was some evidence tending to show that dangerous condition with respect to highway existed, although occurrence of accident did not raise presumption of negligence (Gen.Laws 1931, Act 5619, § 2).

5. Appeal and error ⇐1011(1)

Finding of fact which is based on conflicting evidence cannot be disturbed.

6. Judgment ⇐630

Rendition of judgment in favor of county officers being sued for death of driver who was thrown from automobile which ran into projecting rails at railroad crossing upon sustaining of county officers' general demurrer to complaint *held* not to destroy right of recovery against county which was jointly sued under statute making county liable to general public for dangerous conditions of public highways (Gen.Laws 1931, Acts 5618, 5619, § 2).

7. Death ⇐84

Beneficiaries suing for death can recover burial expenses which have been paid by them, or for which they are liable.

8. Death ⇐84

Funeral expenses paid by deceased's administrator out of proceeds of life policy payable to deceased's estate at request of sole beneficiary, who was financially unable to pay such expenses, could be recovered in death action prosecuted for sole beneficiary.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by William F. Adams, as administrator of the estate of Leo R. Schwanekamp, deceased, against the Southern Pacific Company, the County of San Bernardino and others. From the judgment, the plaintiff and the County of San Bernardino appeal.

Reversed, with directions.

Prior opinion, 45 P.(2d) 398.

Swing & Swing and Stanley Mussell, Dist. Atty., all of San Bernardino, for San Bernardino County.

William F. Adams, of Los Angeles, and Duckworth & Harrison, of San Bernardino, for William F. Adams.

PER CURIAM.

After examination of the entire record in this matter, we hereby adopt as and for the decision of this court, with such additional discussion as will hereinafter appear, the following portions of the opinion prepared by Mr. Justice Jennings when the cause was pending before the District Court of Appeal, in and for the Fourth Appellate District:

This action was instituted by the administrator of the estate of Leo R. Schwanekamp, deceased, for the purpose of recovering compensatory damages for the death of said Schwanekamp, which was alleged to have been caused by the joint negligence of the railroad company and the county of San Bernardino. The plaintiff's complaint also sought recovery of damages for loss of property and for burial expenses of the deceased. At the conclusion of the trial the court, sitting without a jury, absolved the railroad company from any liability to plaintiff and rendered judgment in plaintiff's favor against the defendant county in the amount of $1,500 for the wrongful death of Schwanekamp, and permitted recovery of the sum of $240 for damages to an automobile which the deceased was operating at the time the accident which

resulted in Schwanekamp's death occurred. From this judgment both plaintiff and the defendant county of San Bernardino have appealed. The latter appeal will herein be first considered. A statement of the undisputed facts disclosed by the evidence is necessary for a proper understanding of the various points urged on this appeal.

At some time between 10 o'clock and 10:30 o'clock in the evening of August 24, 1927, Schwanekamp and a woman companion set out from the city of Redlands to drive to the city of Los Angeles in a Chevrolet coupé automobile which belonged to Schwanekamp and which he drove on the journey. In leaving Redlands they proceeded in a westerly direction on a county highway of the county of San Bernardino which extended along a street known as Barton avenue. At some time between 11 o'clock and 11:30 o'clock of the same evening Schwanekamp and his companion approached a right of way of the Southern Pacific Company which intersected Barton avenue. This crossing is known as the Bryn Mawr crossing. The railroad right of way is 100 feet in width. At the point of intersection there are five tracks on the right of way, the main track of the Southern Pacific Company and four side tracks. Easterly from the right of way, Barton avenue, at the time of the accident, was paved approximately 40 feet in width to a point on the north side of said avenue, which was between 15 and 21 feet from the easternmost rail on the railroad crossing. The street was paved across the railroad right of way to a width of 28 feet. West of the right of way the street was 28 feet in width and was paved to a width of approximately 18 feet. During the month of January, 1926, the pavement on Barton avenue east of the railroad tracks had been extended on the north side for a distance of approximately 12 feet up to a point which was between 15 and 21 feet from the most easterly rail of the railroad tracks. The result of this widening process was to leave unpaved on the north side of the avenue east of the railroad crossing a strip approximately 12 feet in width and between 15 and 21 feet in length. After the pavement had been thus widened, no barrier or fence or sign was placed at the point by the county for the purpose of diverting travel from the unpaved portion of the street or to warn drivers on the highway that they were approaching a railroad crossing whereon the pavement was narrower than that of the highway. On the west side of the crossing at the south side of Barton avenue there was a railroad crossing sign maintained by the railway company, and on the north side of the avenue west of the crossing there was a white fence. On the railroad crossing the rails of the tracks were flush with the pavement on that portion of the crossing which was paved. North of the paved portion the rails extended upward for a distance of about 5½ inches above the surface of the surrounding ground. Schwanekamp was driving his automobile along the north side of the avenue as he approached the railroad crossing. When his automobile reached the crossing, one or more of the front wheels struck the first protruding rail which was encountered. This sudden contact caused both persons in the automobile to be thrown from it. Schwanekamp was thereby injured so severely that he died two days later. The automobile continued on its course for some distance and was overturned and almost completely wrecked.

The contentions of the appellant county of San Bernardino on its appeal from the judgment may be summarized as follows: Respondent sought to impose liability upon appellant and its codefendant, the Southern Pacific Company, for the alleged wrongful death of his intestate on two grounds. These were that they were guilty of negligence, first, in failing to have paved the railroad crossing to the same width that the highway east of said crossing was paved, and, second, in failing to have erected a barrier or some obstruction, or a sign which would have conveyed warning to travelers on the highway that the railroad crossing was not paved to the same width as the highway and that, due to the narrower paving and exposed rails, they were approaching a place of danger. No liability could be imposed upon the county for failure to have more extensively paved the railroad crossing. The evidence produced during the trial showed that the Southern Pacific Company was the owner of the right of way and had exclusive control over it, and that the county had no authority to enter upon such right of way and to pave or otherwise to improve it. The liability of the appellant county must therefore rest upon the charge that it was negligent in having failed to erect a barrier or sign which would have conveyed warning to travelers on the highway that they were approaching a railroad crossing whereon the pavement was nar-

rower than on the highway. The alleged negligence of appellant in the last-mentioned respect does not amount to a charge that the highway itself was defective in any respect or that the extension of the pavement on the highway east of the railroad crossing created a condition that was inherently dangerous. The liability of appellant is based upon its alleged negligence in having failed to perform a duty which it owed to the traveling public. Appellant is not an insurer of the safety of the highways under its control. The primary question to be answered is whether it may be declared that a reasonably prudent person should have foreseen that the failure to warn by the erection of a sign or barrier would be reasonably certain to endanger the safety of persons rightfully using the highway. The conditions shown by the evidence to have existed at the time of the accident indicate that this question should have been answered in the negative. It was shown that the protruding rails on the unpaved portion of the railroad crossing were visible to drivers of motor vehicles approaching the crossing from the east for a distance of at least 2,000 feet during the daytime and for a distance of at least 200 feet at night if the automobiles of such drivers were equipped with efficient headlights properly illuminated. Even though the above-stated question should be answered in the affirmative, the burden rested upon respondent to show that appellant's negligence was proximate cause of the death. This burden was not sustained. Contributory negligence of the deceased was pleaded and proved as a proximate cause of death and the property damage shown to have resulted from the accident. The evidence conclusively established that the place of danger was clearly visible to an automobile driver at night if his automobile was equipped with proper headlights properly illuminated. If it be assumed that respondent's intestate did not see the narrower pavement on the railroad crossing and the adjacent protruding rails of the railway tracks, he was himself chargeable with his failure in this regard, a failure which constituted negligence directly contributing to the happening of the accident that cost him his life. These contentions merit careful consideration.

It is conceded that liability is here sought to be imposed on appellant county of San Bernardino in accordance with the provisions of section 2 of Act 5619 of the General Laws of California (Stats. 1923, p. 675; Deering's Gen. Laws 1931, Act 5619). So far as is here relevant, this statute provides that "Counties, * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways * * * in all cases where the governing or managing board of such county * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1] It is evident from the above-quoted language that Act 5619 is a general act, defining the liability of a county and the other public bodies named therein to the general public and specifying the conditions under which said liability may attach. Ahern v. Livermore Union High School District, 208 Cal. 770, 782, 284 P. 1105. One of the important conditions precedent to the imposition of such liability is the requirement that the governing or managing board of the county shall have had knowledge of the defective or dangerous condition of the street or highway which is alleged to have been the proximate cause of the injuries sustained. The question of knowledge, which is often an important feature in actions based upon the above-mentioned statute, is not here present. It is conceded that appellant had notice of the condition which is alleged to have been a dangerous condition. Nor is it disputed that the highway whereon the deceased was traveling at the time he was fatally injured was a public highway under the control of appellant. The important primary question in the case is whether or not it was satisfactorily shown that there was in fact any defective or dangerous condition of the highway which appellant should have remedied. A consideration of this question in effect amounts to a consideration of appellant's contention that the trial court's finding that appellant was negligent is lacking in evidentiary support. A consideration of this contention requires a summary of the evidence which bears upon the question.

The only evidence presented to the trial court which showed the circumstances immediately preceding the happening of the accident consisted of the testimony of the woman who was then riding in the automobile operated by the deceased as his guest. The testimony of this witness may be summarized as follows: The witness and deceased set out from Redlands on the return journey to Los Angeles between 10 o'clock and 10:30 o'clock in the evening in a Chevrolet coupé, which was the property of deceased, and was being then operated by him. As they proceeded in a general westerly direction along a highway which neither had ever before traversed, they approached the scene of the accident at approximately 11:30 p. m. The night was dark. The headlights of the automobile were burning and illuminated the roadway in front of the automobile for a distance of at least 200 feet. The automobile was proceeding along the north side of the street. For some distance prior to arriving at the scene of the accident the automobile was operated at a speed of approximately 30 miles per hour. When the vehicle arrived at the point where the paving on the north side of the highway terminated, the speed was decreased to about 25 miles per hour, and as it approached nearer to the railroad crossing, the driver applied the brakes with the result that the speed of the automobile was further decreased to about 15 miles per hour. The driver also caused the car to swerve slightly to his left. His efforts to prevent the wheels of the automobile from coming in contact with the projecting rails of the railroad were unsuccessful. At the time the wheels of the automobile struck the rails, both doors of the coupé flew open and both occupants of the machine were thrown from it. For a distance of approximately 150 feet east of the railroad crossing the highway made a slight ascent. The witness was awake and was looking ahead in the direction in which the automobile was proceeding. When the car arrived at a point about 15 feet east of the place where the pavement on the north side of the highway came to an end, she observed that they were approaching the end of the pavement. She had theretofore observed a railroad crossing sign which was on the south side of the highway and west of the railroad crossing, and a white fence which was on the north side of the highway and likewise west of the railroad crossing, and was aware that the machine was approaching a railroad crossing. She did not, however, then observe the projecting rails of the railroad and did not see such rails until the coupé was very near the easternmost rail and "almost ready to hit" this rail.

It is obvious that the basis for respondent's claim that the fatal accident was caused by the negligence of appellant rests upon the contention that the failure of appellant to have erected a barrier or other obstruction or a warning sign at or near the point where the pavement terminated on the north side of Barton avenue created a dangerous condition. Appellant maintains that no duty rested upon it to erect such obstruction or sign unless it can be declared that appellant should have foreseen that automobile drivers using ordinary care for their own safety would not perceive the projecting rails in ample time to avoid striking them. This suggestion is so closely interwoven with the contention that the evidence showed that the deceased was guilty of contributory negligence that it will be considered along with the contributory negligence contention. With respect to the general charge that the evidence failed to show that appellant was guilty of negligence in having failed, with knowledge of the situation, to erect a barrier or sign, it must be conceded that this question was one of pure fact to be determined by the trial court. We are not constrained to disturb the finding of negligence upon the facts disclosed by the record.

[2,3] In support of the contention that the finding negativing contributory negligence by the deceased is not supported by the evidence, it is declared that there was uncontradicted evidence which showed that the rails were clearly visible at night for a distance of 200 feet east of the railroad crossing, and it is therefore argued that the testimony of the above-mentioned witness to the effect that she did not see the rails until the automobile in which she was traveling was "almost ready to hit" the easternmost rail necessarily gave rise to the inference that she was not giving proper attention to what was ahead. In other words, the effort is made to apply the principle that one is under the duty of seeing that which is visible. The chief difficulty which arises in attempting to apply the principle is that it must be applied, not to the witness, but to the driver of the automobile to recover damages for whose death this action was instituted. If it be conceded that the principle is applicable to the passenger, a concession that is depend-

ent on the inference that she must have seen what was visible, it does not follow therefrom that it must be declared that the driver must have seen the projecting rails because they were generally visible at night for a distance of 200 feet east of the railroad crossing. We may not overlook the general presumption that one who is operating an automobile on a highway will employ ordinary care for his own safety. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083. Furthermore, there was no showing that the conditions which existed at the time when other witnesses testified they could see the rails for a distance of 200 or more feet east of the railroad crossing in the nighttime were the same as the conditions which prevailed at the time of the accident which formed the basis of this action. We think, therefore, that it did not sufficiently appear that the projecting rails were necessarily always visible in the nighttime for a distance of at least 200 feet, so that we must declare that the trial court committed reversible error in failing so to find and in further failing to find that the deceased was himself guilty of negligence in not having seen that which was visible. Bennett v. Kings County, 124 Cal.App. 147, 12 P.(2d) 47.

The negligence of the county for which recovery was here permitted was, as heretofore mentioned, the failure so to have obstructed the highway by means of a fence or guard rail or in some other manner to have conveyed information to the drivers of automobiles that a railroad crossing was in close proximity and that the pavement over such crossing was narrower than the highway up to the point where the paving on the north side of such highway ended. It is undenied that the deceased operated his automobile on his right-hand side of the highway as he approached the railroad crossing. There was evidence that he was driving at a moderate rate of speed as he proceeded up the slight grade which brought him nearer to the crossing and that he decreased this rate of speed twice, the second diminution occurring when he applied his brakes at about the time he arrived at the unpaved portion of the highway and amounting to a reduction of approximately half the speed at which he was then operating the automobile. The evidence also indicates that he attempted to swerve the automobile to the left for the purpose of avoiding the projecting rails, that he was unsuccessful in so doing, and that the right front wheel of the coupé came in contact with the easternmost rail, which projected some 5½ to 7 inches above the surface of the ground at that point. The evidence also showed that the sudden striking of the right front wheel of the automobile with the projecting rail caused both doors of the automobile to fly open and the deceased to be thrown from the coupé, thereby suffering injuries which later caused his death. The questions of the alleged negligence of the county of San Bernardino in the above-mentioned regard and the alleged contributory negligence of the deceased were questions which were to be answered by the trial court from the facts and circumstances disclosed by the evidence presented to it. The court, unaided by a jury, has performed this duty and has answered the questions adversely to the appellant county, and we do not find ourselves impelled to declare that it has arrived at an erroneous conclusion from the record here presented.

The appellant county points to the fact that the evidence presented during the trial showed that no other accident of the character which caused the injuries here complained of had occurred at the Bryn Mawr crossing for a period of two years. From this it is argued that the trial court evidently accepted the evidence of the accident which resulted in Schwanekamp's death as proof of the fact that the failure to obstruct the highway or to post a warning sign constituted negligence. In thus attacking the finding of negligence, it is confidently asserted that the mere fact that an accident occurred was not sufficient alone to raise a presumption of negligence.

[4,5] With respect to this particular contention, it may be conceded that proof of the occurrence of the accident might not, standing alone, suffice to raise a presumption of negligence. It was, however, some evidence which tended to show that a dangerous condition with respect to the highway existed at Bryn Mawr crossing. Hook v. City of Sacramento, 118 Cal.App. 547, 552, 5 P.(2d) 643. Appellant's evidence that no similar accident had occurred for a number of years prior thereto was addressed to the proposition that the place was not dangerous. It is apparent that upon this point, therefore, the evidence was conflicting, and that the trial court resolved the conflict in respondent's favor. No citation of authorities is re-

quired to support the familiar rule of appellate procedure that a finding of fact which is based on conflicting evidence may not be disturbed by a reviewing court. Furthermore, it must be observed that the mere fact of injury was not the only evidence before the trial court which tended to show that a dangerous condition existed at the crossing. The court also had the testimony of the deceased man's companion at the time the accident occurred, which portrayed the circumstances immediately surrounding the occurrence of the accident.

[6] There is some suggestion that because of the fact the respondent originally joined certain officers of San Bernardino county as defendants in the action and judgment was rendered in favor of these officers upon the sustaining of a general demurrer in their behalf to the complaint, which judgment was affirmed on appeal, therefore the judgment against appellant may not here be affirmed, since the county's agents who were responsible for the condition of county highways have been thus absolved of liability. This argument is based on the familiar doctrine of agency that, in order to hold the principal liable for the agent's tort, the liability of the agent must first be established.

The record shows that when this action was first instituted, James W. Cole, the highway commissioner of San Bernardino county, and Charles Long, a district highway commissioner, were joined as defendants therein, and that recovery of damages was sought against them jointly with their codefendants, the appellant county and the Southern Pacific Company. The above-named officers of appellant and appellant demurred to the complaint. The demurrer was sustained with leave granted to respondent to amend the complaint. Thereafter, on application of respondent, the order sustaining the demurrer of the officers of the county and granting leave to amend was so modified that leave to amend was eliminated from the order. Thereupon judgment dismissing the action as to the officers of the county was duly entered. At a somewhat later date, respondent having failed to amend his complaint, so far as the appellant county was concerned, within the time specified in the court's order sustaining the demurrer, judgment of dismissal was entered in favor of appellant. From both of the above-mentioned judgments respondent herein, William F. Adams, appealed. On this appeal the judgment dismissing the action as to the officers of appellant was affirmed on the ground that Adams, having requested that the demurrer of the county officers be sustained without leave to amend, necessarily consented to the rendition of the judgment in their favor and could not therefore object to the judgment by appealing from it. The judgment dismissing the action as to the county of San Bernardino was, however, reversed on the ground that the complaint stated a cause of action against the county. Adams v. Southern Pacific Co., 109 Cal. App. 728, 293 P. 681.

We think that it may not now be successfully urged that because the respondent consented to the entry of a judgment in favor of the county officers on the sustaining of a general demurrer to his complaint he thereby lost his right to seek a recovery against the county. It is obvious that, so far as the county is concerned, his cause of action is based on the provisions of section 2 of the above-mentioned Act 5619. The allegations of the complaint show that such was the case, and the record indicates that the suit was tried on the theory that the county's liability could only be maintained by virtue of this particular statute. This section of the act does not purport to give a right of action against any officer of a county. Its scope is limited specifically to conferring a right of action against certain designated public corporations for specific acts of negligence relating to a dangerous or defective condition of public streets, highways, buildings, grounds, works, and property. The scope of the section is further restricted by the limitation that knowledge or notice of the defective or dangerous condition shall be a prerequisite to the imposition of liability. As was said by Mr. Justice Langdon in Watson v. City of Alameda, 219 Cal. 331, at page 333, 26 P. (2d) 286, 287: "The municipality is not, under this statute, liable in the same manner as a private corporation, for negligence of its employees; nor is it enough to show a dangerous condition of property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery." It may further be ob-

served that the liability of public officers, as distinguished from public corporations, for injuries resulting from the defective or dangerous condition of a public street or highway and the conditions under which such liability may be imposed are declared by another statute, to wit, the Act of May 18, 1919 (Stats. 1919, p. 756; Deering's Gen. Laws, 1931, Act 5618). See Shannon v. Fleishhacker, 116 Cal.App. 258, 261, 2 P.(2d) 835.

[7] We cannot accept the remaining portions of the District Court of Appeal opinion dealing with the plaintiff's appeal from the judgment in so far as it fails to allow recovery for burial expenses aggregating $1,164.02. The trial court found that the burial expenses were paid by the Wisconsin administrator "for and in behalf of the estate of [decedent] and in behalf of said Barney Schwanekamp, sole heir of said decedent and sole distributee of said estate." This finding is supported by evidence, introduced by way of deposition, to the effect that the Wisconsin administrator had paid the same because the father and sole heir of decedent was practically destitute and unable to personally discharge the same and had requested the administrator to care for the matter for him. The trial court further found that the several items included in the burial expenses "were reasonable and proper." It improperly concluded, however, that they were "not proper items to be allowed" in this action. It is now settled in this state, and appears to be supported by the weight of authority elsewhere, that in an action for wrongful death the beneficiaries may recover burial expenses which have been paid by them or for which they are liable. Koehl v. Carpenter, 47 Cal.App. 642, 646, 191 P. 43; Little v. Yanagisawa, 70 Cal.App. 303, 308, 233 P. 357; 17 C.J. 1338, §§ 215 and 216.

[8] We are not impressed with the argument that the funeral expenses here involved were not personally paid by the beneficiary for whom this action is prosecuted, but were discharged by the application of the proceeds of a certain insurance policy on the life of the decedent and payable to his estate. As intimated above, the father and sole beneficiary of the decedent was financially unable to personally and directly pay the funeral expenses and requested the administrator to care for them. The method adopted for the payment of the burial expenses was apparently the only one available to the decedent's father, and, of course, served to diminish the value of the estate coming to him as sole heir. We perceive of no sound reason why, under the circumstances, he should not recover such funeral expenses just as he would had they been personally and directly paid by him.

The judgment is reversed, with directions to the court below to amend its findings, conclusions of law, and judgment so as to permit the plaintiff to recover, in addition to the amounts already allowed, the sum of $1,164.02 expended for burial purposes. Plaintiff to recover his costs on appeal.



5 Cal.2d 35

TEXAS CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. (OLCESE et al., Interveners).

S. F. 14998.

Supreme Court of California.

Dec. 30, 1935.

1. Executors and administrators ⇐150

If lease executed by special administrator was void, lessee was entitled to return of consideration paid for lease.

2. Courts ⇐198

Probate proceedings being purely statutory and therefore special in their nature, the superior court, although court of general jurisdiction, is circumscribed in such class of proceedings by provisions of statute conferring such jurisdiction and may not proceed in manner essentially different from that provided.

3. Executors and administrators ⇐10

Residence and death of intestate within county gave superior court of that county, by virtue of petition for letters of administration, jurisdiction of subject-matter of intestate's estate.

4. Executors and administrators ⇐9

Although jurisdiction over subject-matter of estate authorized appointment by superior court of an administrator, where statutory provisions provided exclusive method for exercise of such authority, an appointment contrary to applicable statute would be in excess of court's "jurisdiction."

"Jurisdiction" sometimes means authority over the subject-matter, but it also frequently means authority to do particular thing done.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

5. Executors and administrators ⇐150

Presentation of petition for an order to lease realty of decedent's estate by an authorized person is jurisdictional fact and if court erroneously grants petition of unauthorized person, its order is void and cannot support lease (Code Civ.Proc. § 1579, subd. 1).

6. Executors and administrators ⇐20(10)

In seeking and obtaining permission of superior court to lease property of estate, bank was not acting under its appointment as general administrator, since prosecution of appeal from order of appointment, pending which appeal the proceedings were had for leasing the property, suspended authority of bank as general administrator (Code Civ. Proc. § 1579).

7. Executors and administrators ⇐22(2)

Proceedings in certiorari resulting in annulment of order appointing bank special administrator was a direct attack on order.

8. Executors and administrators ⇐29(2)

Action to recover consideration paid for lease executed by bank as special administrator on ground that lease was void because of void appointment of bank as special administrator constituted a collateral attack on order of appointment (Code Civ.Proc. § 1579).

9. Judgment ⇐475

Same presumption as to jurisdiction attaches to decrees in probate proceedings on collateral attack as to other judgments of superior court as a court of general jurisdiction.

10. Judgment ⇐485

To be attackable collaterally for lack of jurisdiction, order in probate proceedings must be void on its face, in which case it can be attacked at any time, but it is not void on its face unless record affirmatively shows that court was without jurisdiction to make order.

11. Executors and administrators ⇐29(3)

Where notice of application for appointment of special administrator was necessary to give court jurisdiction but order of appointment recited that notice was not necessary and was dispensed with, order was void on its face and could be attacked any time, directly or collaterally, either by parties or strangers (Code Civ.Proc. § 1412).

12. Executors and administrators ⇐150

Where order appointing bank special administrator was void, lease of estate lands executed by such special administrator was likewise void (Code Civ.Proc. §§ 1412, 1579).

13. Statutes ⇐268

Curative statutes generally cure merely those defects which do not concern jurisdictional steps.

14. Executors and administrators ⇐22(3)

In view of large powers of special administrator, some reasonable notice to persons interested in estate prior to his appointment should be required (Code Civ.Proc. § 1412).

15. Executors and administrators ⇐22(1)

Total lack of jurisdiction to appoint special administrator due to absence of notice sufficient to constitute due process of law could not be cured by curative statute (Code Civ.Proc. § 1412; St.1931, p. 1409).

16. Executors and administrators ⇐150

Doctrine of caveat emptor was inapplicable to defeat lessee's recovery of consideration paid special administrator for lease which was void because of invalidity of appointment of special administrator, although doctrine was applicable in so far as estate's title to demised property was concerned (Code Civ.Proc. §§ 1412, 1579).

17. Executors and administrators ⇐377

Void probate sales may be ratified either directly or by course of conduct which estops the party from denying their validity.

18. Executors and administrators ⇐150

Where lease executed by special administrator was void because of invalidity of such administrator's appointment, agreement, to which lessee was not a party, executed by special administrator and heirs ratifying acts of administrator was insufficient to validate lease and to prevent lessee's recovery of consideration paid, in view of statutory provision that no unauthorized act can be made valid retroactively to prejudice of third persons without their consent (Code Civ.Proc. §§ 1412, 1579; Civ.Code, § 2313).

19. Executors and administrators ⇐150

Lessee of estate property under lease which was void because of invalidity of special administrator's appointment, never having exercised any rights under lease and having, on learning that appointment was invalid, made repeated demands, first, for valid lease and then for its money, and having warned administrator that it would be held responsible for the money *held* not estopped from asserting invalidity of lease and demanding repayment of consideration given (Code Civ.Proc. §§ 1412, 1579).

20. Executors and administrators ⇐150

Lessee of estate property under lease which was void because of invalidity of appointment of special administrator was not concluded, by order settling and approving administrator's account, from demanding of special administrator repayment of consideration since lessee, not being person interested in estate, and not being able to contest account, was not bound by order of settlement (Code Civ.Proc. §§ 1412, 1579; Probate Code, §§ 927, 931).

21. Executors and administrators ⇐504(6)

Probate court in settlement of an administrator's account has no jurisdiction to determine rights of those claiming adversely to estate nor to confirm a previous sale made by administrator (Probate Code, §§ 927, 931).

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the Texas Company against the Bank of America National Trust & Savings Association, Victor Olcese, and others, as administrators of the estate of L. V. Olcese, also known as Louis Virgin Olcese, deceased, in which Emelia G. Olcese and others intervened. From a judgment for plaintiff, the first named defendant appeals.

Affirmed.

Prior opinion, 45 P.(2d) 1015.

Borton & Petrini, of Bakersfield, for appellant.

Charles C. Stanley and J. A. Tucker, both of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision of the District Court of Appeal, First Appellate District, Division 1, to give further consideration to the questions of the jurisdiction of the court arising from the stipulated facts. Upon such further consideration we have concluded that the law as it existed at the time of the appointment of the special administrator and the making of the order authorizing the lease involved was correctly stated in the opinion prepared by the District Court of Appeal. We therefore adopt that opinion as the opinion of this court on the disposition of the appeal herein. The opinion of the District Court of Appeal follows:

[1] After a trial upon stipulated facts, judgment was rendered that respondent recover from appellant money paid as consideration for the execution by the latter, as special administrator of the estate of L. V. Olcese, of an oil lease demising land of the estate to the former. The regularity of the proceedings for authority, taken under section 1579 of the Code of Civil Procedure, is not challenged. This appeal raises the following questions: (1) Was the lease void, because of a void appointment of appellant, as special administrator? and (2) Was the lease, if void, validated by curative statutes or subsequent conduct of the parties? If the lease was void, respondent was entitled to a return of its payment for the lease. Schlicker v. Hemenway, 110 Cal. 579, 42 P. 1063, 52 Am.St.Rep. 116; Hellman v. Merz, 112 Cal. 661, 44 P. 1079.

The following facts appear from the stipulation: L. V. Olcese died intestate on August 20, 1929, having been a resident of and leaving an estate in Kern county. He left as heirs a brother, three sisters, and others of no present concern. On August 28, 1929, the brother and two sisters, and, on August 30, 1929, appellant, as nominee of the third sister, separately petitioned the superior court of Kern county for letters of administration. After hearing the two petitions, the superior court, on September 12, 1929, made its order denying the first and granting that of appellant, to whom, on the same day, after qualification, letters of administration were issued. The brother, a week later, appealed to the Supreme Court from this order without requesting a writ of supersedeas. On September 21, 1929, upon appellant's petition therefor, the superior court, by an order reciting that notice of the hearing had been dispensed with as unnecessary, appointed it as special administrator with the powers of a general administrator. Special letters were issued the same day to appellant, who thereafter and until June 7, 1930, acted thereunder. On March 28, 1930, the Superior Court after due and regular proceedings under said section 1579 authorized appellant, as special administrator, to lease lands of the estate to respondent, and appellant, in consideration of the receipt of $4,800, executed the lease in question. The Supreme Court on August 30, 1930, reversed the order appointing appellant general administrator (Estate of Olcese, 210 Cal. 262, 291 P.

193), and, on October 27, 1930, annulled the order appointing it special administrator (Olcese v. Superior Court, 210 Cal. 566, 292 P. 964).

[2-4] "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. Smith v. Westerfield, 88 Cal. 374, 379, 26 P. 206." Estate of Strong, 119 Cal. 663, 666, 51 P. 1078, 1079. The facts of the death of the intestate and of his residence within Kern county gave the superior court of that county jurisdiction of the subject-matter of his estate. Haynes v. Meeks, 10 Cal. 110, 70 Am.Dec. 703. That jurisdiction was acquired by virtue of the petitions for letters of administration. Middlecoff v. Superior Court, 149 Cal. 94, 97, 84 P. 764. Jurisdiction sometimes means authority over the subject-matter, but it also frequently means authority to do the particular thing done. Spreckels S. Co. v. Industrial Acc. Comm., 186 Cal. 256, 260, 199 P. 8. Although jurisdiction over the subject-matter of the estate authorized the appointment of an administrator, yet, since various provisions of the Code of Civil Procedure provided the exclusive method for the exercise of such authority, an appointment contrary to the applicable provisions would be in excess of the court's jurisdiction. The Supreme Court reversed the order of appointment because it violated section 1365 of such Code which gave the brother and sisters a preference over a nominee of one sister. Estate of Olcese, supra. It annulled, for want of jurisdiction, the order appointing the special administrator, because notice of the application for such appointment had not been given in compliance with section 1412 of this Code. Olcese v. Superior Court, supra.

[5, 6] Because of the similarity in the procedure for a lease, as stated in said section 1579, with that provided for a sale by section 1537 of the same Code, before its repeal in 1919, it would seem that the rule, under the latter, as to the jurisdictional necessity of a petition in the case of a sale should be equally applicable in the case of a lease. Under that former procedure, jurisdiction of the sale proceedings came from the filing of the petition and not from the general jurisdiction of the court over the administration of the estate. 11 Cal. Jur. 901. Subdivision 1 of section 1579 restricts permission to apply for an order to lease realty of a decedent's estate to the administrator, executor, or a person interested in the estate. The presentation of a petition by an authorized person is a jurisdictional fact and, if the court erroneously grants the petition of an unauthorized person, its order is void and cannot support a lease. Freeman, Void Judicial Sales, § 10. An attempted sale of land by one who assumes to act as administrator, but who has not been regularly appointed, and who has not given the bond and qualified and received letters as such, is void, even if the sale is ordered and approved by the probate court. Pryor v. Downey, 50 Cal. 388, 19 Am.Rep. 656. Respondent solely attacks the validity of the lease on the ground that, since the order appointing appellant as special administrator was void, it lacked authority to execute it. Appellant seeks to supply any such want of authority by claiming that it also acted as general administrator in such execution. The stipulated facts bar such claim for they show that appellant did not act as general administrator after the appeal from the order appointing it general administrator had been perfected and that it, as special administrator, sought and obtained permission to lease. Legally, the claim is equally untenable because that appeal suspended its authority as general administrator (Estate of Stough, 173 Cal. 638, 161 P. 1), and such suspension made possible its appointment as special administrator (Estate of Chadbourne, 14 Cal.App. 481, 112 P. 472; Estate of Heaton, 142 Cal. 116, 75 P. 662).

[7-12] The proceeding in certiorari, which resulted in an annulment of the order appointing appellant special administrator (Olcese v. Superior Court, supra) was a direct attack upon that order. Miller v. Superior Court, 84 Cal.App. 605, 258 P. 614. The present case involves a collateral attack upon that order. Baxter v. Boege, 173 Cal. 589, 160 P. 1072; Baldwin v. Stewart, 218 Cal. 364, 23 P.(2d) 283. The same presumption as to jurisdiction attaches to decrees in probate proceedings upon collateral attack as to other judgments of the superior court, as a court of general jurisdiction. Burris v. Kennedy, 108 Cal. 331, 41 P. 458. To be attackable collaterally for lack of jurisdic-

tion, the order must be void on its face and it is not void on its face unless the record affirmatively shows that the court was without jurisdiction to make the order. Hogan v. Superior Court, 74 Cal.App. 704, 241 P. 584. If the record discloses that the court had no jurisdiction to make the order of appointment, then it is void and can be attacked at any time. Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370; Pearson v. Pearson, 46 Cal. 609. The order, a copy of which is attached to the stipulation, recites that "in the judgment and opinion of the court, no notice of the application for this order is necessary and such notice is now hereby dispensed with." Since notice was required to obtain jurisdiction (Olcese v. Superior Court, supra), the order is void on its face. Such an order may be attacked any time or anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity and can be neither a basis nor evidence of any right whatever. Estate of Pusey, 180 Cal. 368, 181 P. 648. A judgment void on its face is a nullity and all acts performed under it are void. Kreiss v. Hotaling, 96 Cal. 617, 31 P. 740. We are satisfied, therefore, that the lease was void.

[13-15] To validate the void lease, appellant relies upon the last two sentences of said section 1579, which read in part as follows: "Jurisdiction of the court to administer the estate of the decedent * * * shall be effectual to vest such court and judge with jurisdiction to make the order for the lease. * * * No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof." The court had jurisdiction to administer the estate, but, because of failure to give the notice required by statute, it never acquired jurisdiction to appoint appellant special administrator. Monk v. Morgan, 49 Cal.App. 154, 159, 192 P. 1042. Appellant was not authorized to file a verified petition and, without such petition, the court did not have jurisdiction to make the order for the lease. Wills v. Pauly, 116 Cal. 575, 48 P. 709. The literal wording of the first sentence, above quoted, would appear to supply the lack of jurisdiction to make the order for the lease by means of the jurisdiction to administer the estate. Although this provision has been in effect since its adoption in 1887, its meaning and effect seem never to have been declared by the appellate courts of this state. In considering a statute worded identically, except as to a few minor differences, the Supreme Court of Montana, in State ex rel. Shields v. Second Judicial District Court, 24 Mont. 1, 60 P. 489, 493, said: "If the court could grant them a lease under these circumstances, then it could, of its own motion, without any application or notice, or hearing, grant a lease to any person making it known that a lease was desired. This the court could not do. Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute. State v. Second Judicial District Court, 18 Mont. 481, 46 P. 259; In re Higgins' Estate, 15 Mont. 474, 39 P. 506, 28 L.R.A. 116. Jurisdiction over the estate, and the power arising therefrom to make the order for a lease, inure to the benefit of the lessee only when they have been invoked by proper application. The error, omission, or irregularity referred to in the latter part of subdivision 6 of the statute, upon which counsel relies for a justification of the order of June 10th, certainly does not warrant dispensing with a verified petition by some authorized person, and notice to all parties interested. The order of the district court made and entered on June 10th must be annulled." In Pryor v. Downey, supra, 50 Cal. 388, at page 398, 19 Am.Rep. 656, the Supreme Court "expressed the opinion that the words 'defects of form, omissions or errors,'" as used in the act of April 2, 1866, validating probate sales of realty, "did not embrace a want of power in the person assuming to act as administrator, or the absence of jurisdiction in the court which ordered the sale." The Supreme Court of Oregon reached the same conclusion as to the effect of a similar curative statute in Browne v. Coleman, 62 Or. 454, 461, 125 P. 278, 281, as follows: "It is claimed that the curative statute (section 7156, L. O.L.) bars the right of defendants in this case, but such statute is limited in its operation to 'irregularities, defects or informalities,' and it is evidently not intended to extend to sales which are absolutely void, and such has been the holding of this court (Mitchell v. Campbell, 19 Or. 198, 24 P. 455; McCulloch v. Estes, 20 Or. 349, 25 P. 724; Fuller v. Hager, 47 Or. 242, 83 P. 782, 114 Am.St.Rep. 916)." A statute, curing irregularities in administrators' sales did not cure a sale which was void for want of jurisdiction to order the sale because of absence of notice to minor heirs

and failure to appoint a guardian ad litem as required by law. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

To give to the above-quoted portion of said section 1579 the broad effect, for which appellant contends, would extend it beyond the limits to which a curative statute may constitutionally go. St. 1931, p. 1409, purporting to validate all previous orders appointing special administrators without notice, upon which appellant also relies, is vulnerable to this same constitutional objection. "These [curative statutes] generally cure merely those defects which do not concern jurisdictional steps and it is usually held that they cannot constitutionally operate to give effect to a sale which is void for want of jurisdiction." 24 C.J. 694. In view of the large powers of a special administrator as in this case, some reasonable notice to persons interested in the estate prior to his appointment should be required. Olcese v. Superior Court, supra. A total lack of jurisdiction due to absence of notice sufficient to constitute due process of law cannot be cured by a curative statute. Miller & Lux, Inc., v. Secara, 193 Cal. 755, 227 P. 171. An act of the Legislature, purporting to validate an order directing a sale of real estate which was void for want of jurisdiction or to validate the sale made under such order, is unconstitutional because it is an attempted exercise of judicial power by the Legislature and contravenes due process of law. Pryor v. Downey, supra. Since a sale of real estate by an administrator divests the heirs of the title which vested in them at the intestate's death, an order for such sale can only be made after notice to them, otherwise the property would be taken without due process of law and therefore a retrospective statute cannot validate a sale without such notice. Lamont v. Vinger, 61 Mont. 530, 202 P. 769. This case is particularly in point for the probate procedure there construed was borrowed from this state and the reasoning is mainly based upon California cases. An order for an administrator's sale of realty, made before the expiration of the time allowed by a citation for the heirs' appearance, was void for want of jurisdiction and was not validated by a statute, whose wording apparently did so, because to give such effect to that statute would divest the heirs of their title without due process of law. Stadelman v. Miner, 83 Or. 348, 155 P. 708, 163 P. 585, 983.

[16] Appellant invokes the doctrine of caveat emptor to defeat respondent's recovery. This doctrine is applicable in so far as the estate's title to the demised property is concerned. Appellant leased such title as the decedent had at his death and it was respondent's duty to ascertain before bidding, the nature of that title, for it could not, after confirmation, complain of any defects therein. Halleck v. Guy, 9 Cal. 181, 70 Am.Dec. 643; Blankenship v. Whaley, 124 Cal. 300, 57 P. 79; Miller & Lux v. Gray, 136 Cal. 261, 68 P. 770; Estate of Verwoert, 177 Cal. 488, 171 P. 105. But, as was said in Herdlicka v. Evans, 165 Iowa, 207, 214, 145 N.W. 84, 86: "The defect here does not rest in the title held by the parties whom the administratrix represented, but inheres in the defective proceedings upon which the right of the administratrix to convey the title contracted for, rests. The rule of caveat emptor does not therefore apply." The doctrine is generally held to be inapplicable to a void probate sale. Ware v. Houghton, 41 Miss. 370, 93 Am.Dec. 258; Bowles' Guardian v. Johnson, 218 Ky. 221, 291 S.W. 29; Fletcher v. Rickey, 114 Fla. 563, 154 So. 147; Zufall v. Peyton, 26 Okl. 808, 110 P. 773, 29 L.R.A. (N.S.) 740. Since a sale, void for want of jurisdiction, does not divest the heirs of title, the doctrine is not applicable, for otherwise the heirs would both retain the title and receive the purchase price. Zufall v. Peyton, supra.

[17-19] It was stipulated that in October, 1931, appellant and all the heirs executed a written agreement by which the heirs ratified all the acts of appellant, as administrator. This action, appellant argues, validated the lease and therefore prevents respondent's recovery of the consideration paid therefor. Void probate sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Freeman, Void Judicial Sales, § 50. The principles of estoppel have often been applied to void probate sales. Ions v. Harbison, 112 Cal. 260, 44 P. 572; McKeeby v. City of Los Angeles, 125 Cal. 639, 58 P. 263; 11 R.C.L. 389 et seq. However, this agreement, to which respondent was not a party, could not adversely affect its rights because section 2313 of the Civil Code provides: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." See Krumdick v.

White, 107 Cal. 37, 39 P. 1066. The following additional facts, appearing in the stipulation, clearly negative any estoppel as to respondent. From correspondence between the parties, it appears that on November 4, 1930, appellant notified respondent that the decision in Olcese v. Superior Court, supra, abrogated the lease, that, thereafter, over several months, respondent made repeated demands, first for a valid lease and then, on failure to receive it, for its money, that on April 2, 1931, appellant advised respondent of the filing of its account and suggested that it participate in its settlement, and that, in reply, respondent warned appellant that it would be held responsible for the money and suggested that any doubt as to who was entitled to the money be determined in an interpleader action. Although appellant's account, which included the money here involved, was settled and approved, the record is silent as to appellant's ever having paid the money to the administrators who succeeded it. A competitor of respondent between February 6 and March 3, 1931, drilled for oil on a location one-half mile from the leased land and in April, 1931, abandoned its well as a failure. Respondent never knew of the invalidity of appellant's appointment as special administrator until notified by appellant and never exercised any rights under the lease, except to record it.

[20, 21] Appellant finally contends that respondent is concluded by the order settling and approving the account because it included an accounting of the bonus for the lease. Section 927 of the Probate Code permits any person interested in the estate to except to and contest an account. Section 931 of the same Code provides that the order settling and allowing the account is conclusive against all persons interested in the estate. Since respondent was not a person interested in the estate, it could not contest the account nor was it bound by the order of settlement. The probate court in the settlement of an account has no jurisdiction to determine the rights of those claiming adversely to the estate (Estate of Burdick, 112 Cal. 387, 44 P. 734) nor can it confirm a previous sale (Estate of Richards, 154 Cal. 478, 98 P. 528).

It follows from the conclusions stated in the foregoing opinion that the judgment should be, and it is hereby, affirmed.

PEOPLE v. STEVENS.

Cr. 3914.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Dec. 31, 1935.

1. Homicide ⇐282

Evidence as to guilt of defendant convicted of first-degree murder *held* for jury.

2. Criminal law ⇐742(1)
Homicide ⇐268

In murder prosecution, question whether crime could have been committed as related by witness, and questions of weight to be accorded to evidence and credibility of witnesses, were for jury.

3. Criminal law ⇐641(1)

Alleged gross and culpable incompetence of attorney chosen by defendant prosecuted for murder *held* not ground for declaring mistrial.

4. Criminal law ⇐633(2)

Misstatement of indictment to jury in omitting name of codefendant was cured by stipulation that jury was amply informed of nature of charge and defendant's plea.

5. Criminal law ⇐798½

In murder prosecution, submission to jury of ballot covering crime of manslaughter *held* not prejudicial, if error, where manslaughter verdict would have required defendant's discharge because of bar of limitations.

6. Witnesses ⇐274(2)

In absence of showing of bad faith of prosecution counsel, cross-examination of witnesses testifying to defendant's good reputation as to their knowledge of certain reported conduct of defendant is permissible where examination tends to test weight of witness' testimony on direct examination, as where reports charge commission of act inconsistent with trait or character which witness was called on to prove.

7. Criminal law ⇐1036(2)

Cross-examination of witnesses called to prove reputation for peacefulness and for truth and veracity of defendant prosecuted for murder, as to their knowledge of certain reported conduct of defendant, *held* not prejudicial error, in absence of request by defendant for admonition that questions concerning such reports were not to be considered as evidence, and of bad faith of district attorney.

8. Criminal law ⇐1170½(1)

In murder prosecution, excluding witness' explanation of affirmative answer to

question whether he had ever been convicted of felony *held* not prejudicial.

LANGDON, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Charles P. Stevens was convicted of murder in the first degree, and he appeals.

Affirmed.

Rehearing denied WASTE, C. J., and LANGDON, J., dissent.

E. G. Haumesch and Anna Zacsek, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

SHENK, Justice.

The defendant was charged by indictment with the murder of Mike Mucich in Los Angeles county on August 6, 1921. On a plea of not guilty, the jury returned a verdict of murder in the first degree without recommendation. The defendant has appealed from the judgment and from the order denying his motion for a new trial.

On the morning of August 7, 1921, the lifeless body of Mike Mucich was found lying on the south side of the road on the west approach of East Ninth street to the Ninth street bridge in Los Angeles. He had come to his death by reason of one of two bullet wounds in his head, either of which would have been fatal. One of the bullets had entered the left cheek four inches in front of the external opening of the ear and had penetrated the base and other lower portions of the brain, pursuing an upward course of about forty-five degrees. There were powder marks about the entrance wound. The other bullet entered just back of the middle part of the left ear, passed slightly upward toward the left side, and also penetrated the brain. One bullet was recovered and was shown to have been shot from a .38-caliber revolver. The body was found on its back with the head toward the west and downhill. Blood marked the face and the shirt worn by the deceased, and blood had run from the head on the ground for a distance of two or three feet.

During the night of August 6, 1921, about midnight, a switch tender of the Santa Fé Railroad Company heard a model T Ford going east on Ninth street. It passed within twenty-five or thirty feet of his shanty. The car stopped, he heard two shots fired, and the automobile was then started up and driven away. On the following morning about 6 o'clock the same witness discovered the body lying about fifty yards distant from the switch shanty. Officers of the Los Angeles police department shortly thereafter arrived to make their investigation.

The defendant at that time was a member of the police department of the city of Los Angeles. At the time of the trial in June, 1935, he was forty-six years of age. He entered the police force in 1910, resigned in 1917 upon request, joined the army in 1918, was reinstated in the police department in 1919. He was discharged from the department for cause in December, 1921.

The defendant reported for duty on Sunday afternoon, August 7, 1921, and was interrogated with reference to his movements on the previous day. He made the statement then that he had been at the home of a Mrs. Minser (then Mrs. Schneider), in a company of friends who, about midnight, all repaired to a barbecue in Chatsworth Park, about forty miles distant; and that he drove Mrs. Minser and one Phil Stickel to the barbecue and returned to the city on Sunday morning to report for duty. An examination of his revolver showed that it had recently been fired and cleaned. The defendant maintained that he had used it in target practice. On the same afternoon he took the other officers to the barbecue which was still in progress. Members of the party who were questioned apparently satisfied the investigators that the defendant had been with them as he reported. No charge was made against him at that time, and except for the occasional accusations against him made by the decedent's brother, the investigation of the death of Mike Mucich was apparently dropped as one of the unsolvable mysteries.

In December, 1921, the defendant was discharged from the police department upon proved charges that he was intoxicated while on duty and for assault upon one Cates. A short time thereafter he moved to the rooming house conducted by Mrs. Minser. The defendant testified that they became intimate, bought a car together, and that Mrs. Minser wanted to marry him. The defendant moved from Mrs. Minser's residence about a year later, following a noisy affray between them when the defendant was arrested. The defendant remained

in Los Angeles county until 1927. On December 31, 1925, Mrs. Minser married Mr. Minser. Shortly after this marriage Mrs. Minser told her husband the story of the killing of Mike Mucich on the night of August 6, 1921, and in which the defendant and Phil Stickel were implicated. The Minsers separated in the latter part of 1929, and thereafter Minser reported the story to the police department. Mrs. Minser was arrested in March, 1930, and held as a material witness to testify before the grand jury, which returned an indictment charging the defendant and Phil Stickel with the murder of Mike Mucich. Stickel was arrested, tried, and acquitted. The defendant Stevens was arraigned on the charge and pleaded not guilty. His trial commenced in June, 1935.

The story told on the stand by Mrs. Minser is substantially the following: On Saturday night, August 6, 1921, a number of persons gathered at her rooming house on Winston street in Los Angeles preparatory to departing for a barbecue at Chatsworth Park. About 11 or half past 11 that night Mrs. Minser came in with others from a fruitless attempt to obtain more wine for the party and saw the defendant at the head of the stairs talking to Phil Stickel. Mrs. Minser testified that she had been drinking and was "practically intoxicated." She heard Stickel protest to the defendant that he "did not want to go." She asked what it was all about and was told it was "about a fight or something." Mrs. Minser said she wanted to go. Stevens finally consented to take her along. The deceased, Mike Mucich, whom Mrs. Minser did not know and had never seen before, came up to them from the other end of the hall and all four of them, including Stickel, entered Stevens' model T Ford touring car. Stevens sat in the driver's seat, Stickel beside him, Mrs. Minser directly back of Stevens, and Mucich on her right. Mucich was a tall, heavy man; Stickel was described as a "little" man. They drove toward Ninth and Santa Fé, a distance of about a mile and a half from Mrs. Minser's house. Mrs. Minser and Mucich were singing. As they approached the old Ninth street bridge, Stickel suddenly pointed his right arm out of the car and said, "Oh, look!" Mrs. Minser looked and immediately heard a revolver shot and saw Mucich's head drop forward on his chest. Stevens ordered Stickel to drag Mucich out of the car. Stickel, with some difficulty, pulled at the body which had slumped down on its knees toward the floor. She testified: "Stickel tried to pull him out * * * finally, I put my hands on him and tried to shove him, and he was dead weight. I took my hands off. I was dumfounded. Finally, I don't know how, but he and I had got to hauling and pulling him out, he got out of there and hauled him alongside of the road next to the machine." Then Stevens told Stickel to shoot him to make sure he was dead. Stickel fired a shot and then took his place again beside Stevens and they drove to the home of Mrs. Minser's parents where they cleaned the gun with kerosene and washed blood from the rear seat. Then they drove back to the rooming house and found no one, so they started for the barbecue. They stayed until about half past 7 in the morning, when Stevens told Mrs. Minser and Stickel that he had to drive back to town to report for duty. All three rode back together and stopped on the way and cleaned blood from the running board by rubbing it with weeds and sticks. Stevens let the other two out at the plaza and Stickel and Mrs. Minser hired another car and went back to the barbecue party. That afternoon about half past 1 or 2, as they were sitting down to eat, Stevens arrived with three officers and questioned the guests. Mrs. Minser testified that on that evening Stevens came to her house and stated to Stickel and her that he had been assigned to work on "his own case," and rehearsed with them as to what they were to do and say; that in this or a similar conversation he told her the reason he stood at the head of the stairs for some time on the night of the party was so people there would see him and remember him as having been there during the evening; that after Stevens moved to her house he threatened her life and pulled a gun on her several times, illustrating what he would do if she told what she knew; and that he broke mirrors and committed other acts of violence about the house.

The defendant testified that he had a short visit with Mucich about 8:30 on the night of August 6, 1921, at the latter's home, and then drove him at his request to a christening on Pleasant avenue, but did not go into the house with him although Mucich wanted him to accompany him because some one had threatened him; that he left him about half past 10 and went to Mrs. Minser's house; that there were a number of people there playing cards and otherwise engaged; that he called Phil Stickel, whom he had known for about two weeks, to the head of the stairs and asked him if he would go with

him to buy more wine for the party but Stickel said he didn't want to go; then Mrs. Minser came up and he gave her the key to his car for the purpose of having some one else go for wine and that he then went into one of the bedrooms and slept for an hour or more; that about half past 12 Mrs. Minser came in and awakened him; that he put Mrs. Minser, who was intoxicated, in the rear seat of his car and went out and found Stickel; that the three drove out to Chatsworth Park; that he left the following morning about half past 7 with Mrs. Minser and Stickel and reported for duty; that they did not stop and clean blood from the running board; that there was no such trip to the Ninth street bridge as that described by Mrs. Minser; and that he had never shot at Mike Mucich. He also testified that in the course of his investigations concerning the death of Mike Mucich it was reported at the address on Pleasant avenue that Mike Mucich arrived there alone the night before at about 10:30 and that he left there alone. Stevens admitted that among other firearms owned by him at that time he possessed a .38-caliber revolver. He denied that he had ever threatened Mrs. Minser.

Phil Stickel testified to much the same effect as Stevens, except that when Stevens proposed that they go for wine somewhere on his beat, and Stickel declined, Mrs. Minser offered to go with Stevens; that he (Stickel) left to attend to his lunch stand business in the neighborhood and that he closed his business and returned about half past 12 and neither Stevens nor Mrs. Minser were there; that he met Stevens on the street about an hour later and that Stevens reported that he had been out getting some wine; that the three of them then went to the barbecue. He substantiates Mrs. Minser's account of the drive back to the barbecue on Sunday in a hired car.

[1, 2] It is unnecessary to add further to the statement of the facts. Sufficient has been stated to indicate that the question of the defendant's guilt was one to be resolved by the jury. The testimony of Mrs. Minser, corroborated to some extent by the testimony of the switch tender and other evidence, supports the conclusion that Stevens was responsible for the taking of Mucich's life. If that testimony was believed, and it unquestionably was, there was but one inference to be drawn, namely, that the killing was premeditated and with malice. The question whether the crime could have been committed as related by Mrs. Minser, and the questions of the weight to be accorded the evidence and the credibility of the witnesses, were for the jury to determine. People v. Tedesco, 1 Cal. (2d) 211, 219, 34 P.(2d) 467; People v. Bolton, 215 Cal. 12, 8 P.(2d) 116; People v. Sieber, 201 Cal. 341, 257 P. 64; People v. Buchanan, 119 Cal.App. 523, 528, 6 P. (2d) 538.

[3] The defendant was represented at the trial by counsel other than those who represent him on this appeal. The first assignment of error is that the court should have declared a mistrial on the ground of the alleged gross and culpable incompetence of the attorney representing the defendant on the trial, who was an attorney of the defendant's own choosing. If there was any error in this regard, it was merely an error of judgment on the part of the defendant in the selection of counsel to represent him.

[4] The appellant contends that there was a misstatement of the indictment to the jury, in that it omitted the name of Phil Stickel as a codefendant with Stevens. If there was such misstatement, it was cured by a stipulation that the jury was amply informed of the nature of the charge and the defendant's plea.

[5] Prejudicial error is assigned by reason of the submission to the jury of a ballot covering the crime of manslaughter. If that was error, it was far from being prejudicial to the defendant. If the jury had returned such a verdict, the court would have been compelled to discharge the defendant because the prosecution for such crime, if committed by the defendant on the night in question, would have been barred by the statute of limitations. People v. Meyers, 39 Cal.App. 244, 178 P. 965; People v. Miller, 12 Cal. 291.

[6, 7] On the trial, before the defendant took the stand, his counsel called witnesses to prove the defendant's reputation for peacefulness and for truth and veracity. On cross-examination these witnesses were questioned as to their knowledge of certain reported conduct of the defendant, for instance, whether they knew that the report was that he had been discharged from the police department for committing acts of unnecessary violence upon others; that he shot two or more bullets into the body of a colored woman after she had fallen; that it had been reported that he was intoxicated while on duty and had committed assaults on some twenty Mexicans, taking knives and other things of value from them;

and that a newspaper had printed a report that C. P. Stevens, a former policeman, had run amuck and fired a dozen shots in a house on Olive street and had driven men and women roomers into muddy streets in their night clothes. Objection to the cross-examination was overruled, and the rulings thereon are assigned as error. In the absence of a showing of bad faith on the part of the counsel for the prosecution, such cross-examination of witnesses testifying to the good reputation of the defendant for peacefulness, or truth and honesty, is permissible where such examination tends to test the weight of the testimony of the witness given on direct examination, as where such reports charge the commission of acts inconsistent with the trait or character which the witness was called upon to prove. People v. Sieber, 201 Cal. 341, 349, 257 P. 64; People v. Weber, 149 Cal. 325, 342, 86 P. 671; People v. Perry, 144 Cal. 748, 750, 78 P. 284; People v. Moran, 144 Cal. 48, 62, 63, 77 P. 777; People v. Gordan, 103 Cal. 568, 574, 37 P. 534; People v. Buchanan, 119 Cal.App. 523, 6 P.(2d) 538; People v. Simons, 70 Cal.App. 143, 232 P. 772; People v. Hightower, 65 Cal.App. 331, 338, 224 P. 110; People v. Stennett, 51 Cal.App. 370, 382–384, 197 P. 372; People v. Burke, 18 Cal.App. 72, 88, 89, 122 P. 435. It may be that upon request being made therefor the defendant would be entitled to an admonition by the court to the jury that questions concerning such reports are not proof of the facts therein contained, and are not to be considered as evidence; but in the absence of such request, and none was made, and without bad faith on the part of the district attorney, and the record reveals none, the defendant's rights have not been prejudiced. People v. Fodera, 33 Cal.App. 8, 12, 164 P. 22.

[8] The defendant predicates error upon the refusal of the court to permit the witness Stickel to explain his affirmative answer to the question whether he had ever been convicted of a felony. Reliance is placed on People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480. The errors complained of in that case were not committed here and nothing occurred in the court's refusal to allow the explanation by the witness Stickel which was prejudicial to the defendant's rights.

An examination of the record discloses that the defendant was fairly tried and that no prejudicial error was committed by the trial court.

The judgment and the order denying the defendant's motion for a new trial are, and each is, affirmed.

We concur: THOMPSON, J.; CURTIS, J.; SEAWELL, J.; CONREY, J.

LANGDON, Justice (dissenting).

I dissent. Although there is evidence in the record, as stated in the majority opinion, sufficient to sustain the conviction, that evidence is of such a nature that it does not warrant the imposition of the death penalty. The murder of which appellant stands convicted was committed in 1921. At that time the police investigated appellant because he had admittedly been with the deceased early on the night of the murder. The story appellant told to the police at that time was carefully checked by the police, and various witnesses, not now available, who saw appellant that night, were interrogated. The stories told by these witnesses tallied with that told by appellant and he was exonerated.

The only witness who testified to facts connecting appellant with the crime was Addie Minser. By her own testimony, she admits that she was very intoxicated at the time she was supposed to have observed the facts to which she testified. She is supposed to have first told the story about the killing to her then husband some five years after the occurrence of the events. Neither she nor Mr. Minser repeated the story until 1930. At that time, Minser had a fight with his wife, separated from her, and carried the tale to the police. Mrs. Minser was arrested and, after a few days in jail, recounted the tale implicating appellant and one Stickel. These two men were jointly indicted. Stickel was tried first and acquitted. It is quite significant that even if Mrs. Minser's story of the automobile ride be believed, that story makes Stickel the killer, not appellant. Although Mrs. Minser testified that she was sitting in the automobile directly behind appellant, who was driving, she testified that she did not see Stevens fire the shot, nor did she see a gun in his possession. She saw no flash, nor did she smell powder. If her story is true, Stickel must have been the murderer, not Stevens; but Stickel has been acquitted. If her story is true, the back seat and running board of the automobile must have been so saturated with blood that the cursory cleaning testified to by her could not possibly have removed the traces of the murder, yet the police examined the car the very

next morning and found nothing suspicious. It is solely upon the testimony of this woman, who was admittedly "very drunk" at the time, who subsequently became very angry at Stevens because he would not marry her, and who did not tell the story to any one for five years, that this conviction is based. There is no other substantial evidence, direct or circumstantial, implicating appellant. No motive was shown. No premeditation was shown. No concert of action between Stickel and appellant was shown. All the witnesses, including Mrs. Minser, concede that Stevens was not drunk. No prior argument or disagreement of any proportions between the decedent and appellant or Stickel was shown. While it must be conceded that Mrs. Minser's story supports the conviction and that the jury is the sole judge of the credibility of witnesses, the story told by Mrs. Minser is so fantastic as to tax my credulity.

Under such circumstances, any errors in the course of the trial warrant a reversal. The record in this case indicates that appellant was represented at the trial by an attorney (not appellant's present counsel), whose presentation of appellant's defense was wholly inadequate. After Mrs. Minser had been called by the people as the prosecution's chief witness and had been cross-examined by appellant's attorney, and after the prosecution had closed its case, appellant's then attorney called Mrs. Minser as his own witness, thus vouching for her, and had her repeat the entire story of that fatal ride. Counsel offered evidence of appellant's reputation for peace and quiet and for veracity. The prosecuting attorney did not object to any of this evidence and, although the trial judge, on the motion for a new trial, conceded that much of this testimony was inadmissible, he permitted it to come in because no objection was made. The prosecuting attorney was then permitted to introduce considerable evidence to rebut this inadmissible evidence. Over objection, newspaper articles concerning appellant, and highly damaging to him, were read to the jury, and the prosecuting officer was permitted to produce and read an affidavit filed with the police concerning appellant and charging him with brutality, robbery and other offenses, without any proof of the truth of such charges. On the motion for a new trial, new counsel having been substituted, the trial judge conceded that appellant was not properly represented and stated that he was not entirely satisfied with the case. He further stated that, in the event of an affirmance, "I will then immediately go to the Governor personally, and I will lay all these facts before the Governor, and ask him to commute it from death to life imprisonment."

Under the circumstances of this case, it would seem that a new trial should have been granted, or the trial judge should have exercised the power conferred upon him by section 1181 of the Penal Code and modified the judgment.

I concur: WASTE, C. J.



4 Cal.2d 711

SPIER v. LANG et al.

SMITH v. LANG-WALL CO.

BUCK & STODDARD, Inc., v. LANG et al.

L. A. 15380.

Supreme Court of California.

Dec. 23, 1935.

1. New trial ⇐164

On motion for new trial, trial court could change its findings and modify its judgment without granting new trial (Code Civ.Proc. § 662).

2. New trial ⇐164

Formal documents changing findings of facts and conclusions of law and modifying judgments, signed on or before August 16 and dated August 3, which was date of minute order denying motion for new trial and modifying judgment, became effective as of August 3, notwithstanding that formal documents were not filed until September 13 (Code Civ.Proc. §§ 660, 662).

3. New trial ⇐155

Filing of formal order more than 60 days after motion for new trial is made does not amount to denial of motion by operation of law, where court passes on motion within 60 days after it is made (Code Civ.Proc. § 660).

4. Joint adventures ⇐8
Partnership ⇐218(3)

Evidence as to whether defendants being sued for materials furnished for drilling oil were partners or joint adventurers *held* for trier of facts.

5. Partnership ⇐6

Division of profits does not establish partnership relation, where there is no joint participation in management of business and division of profits is made to compensate for use of money advanced (Civ.Code, § 2400).

6. Joint adventure ⇐1

Division of profits is necessary to create joint adventure.

7. Partnership ⇐55

Provision of Uniform Partnership Act that receipt by person of share of profits of business was prima facie evidence that such person was partner *held* not applicable, in absence of evidence that profits were received from alleged partnership (Civ.Code, § 2401(4)(d).

In Bank.

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Actions by Charles S. Spier against Major C. D. Lang and others, and by N. Smith against the Lang-Wall Company, a copartnership, etc., and by Buck & Stoddard, Inc., against C. D. Lang and others. From the judgments, the plaintiffs appeal.

Affirmed.

Prior opinion, 44 P.(2d) 610.

William B. Spivak, J. George Gold, Ivan G. McDaniel, Jennings & Belcher, and Stevens Fargo, all of Los Angeles, for appellants.

Edward A. Adams, Robert L. Collins, Maggart & Miller, Victor Ford Collins, Roy Maggart, Geo. A. Miller, McGee & Robnett, A. M. Cannan, and Leo B. Ward, all of Los Angeles, for respondents.

SHENK, Justice.

The plaintiffs in three actions, later consolidated for trial, sued to recover for materials furnished to the "Lang-Wall Company," for the purpose of drilling for oil on a leasehold owned by the defendant C. D. Lang. The "Lang-Wall Company" was not an incorporated company, but was the fictitious name under which the business of drilling on the leasehold was conducted. The several plaintiffs sued the lease owner, Lang; also other persons (who alone will be referred to as the defendants) who had advanced money to Lang for the purpose of drilling wells on the premises, on the theory that they were partners of Lang or joint adventurers so as to make them jointly liable on the several obligations. Whether such a partnership relation existed was the only issue on the trial.

The order of consolidation for trial was pursuant to stipulation and an order entered April 1, 1932. The court found for the plaintiffs and against all of the defendants, and judgment was entered accordingly on June 9, 1932. Notices of the entry of said judgment were filed, the last one on June 18, 1932. The defendants moved for a new trial, and on August 3, 1932, the court entered the following minute order: "Motion for a new trial by said defendants, heretofore submitted on July 27, 1932, is now by the court denied. Judgments are modified to be against C. D. Lang only." An order signed by the judge and dated August 3d, in conformity with the minute order and directing preparation of amended findings and judgment, was filed on September 13th. Also under date of August 3, 1932, the findings of fact and conclusions of law were changed and the judgment modified in accordance with the order of that date. They were served on the plaintiffs' counsel on August 16th, were filed on September 13th, and the judgment was entered on September 16, 1932.

[1] The first contention on the appeal is that the court had no power to amend or modify the judgment because, so it is claimed, the modification was not made in any of the modes authorized by law; and, further, that, if the court had the power, pursuant to section 662 of the Code of Civil Procedure, to make new findings and modify the judgment on denying the motions for a new trial, nevertheless its order in that respect was made after the expiration of the sixty-day period within which it had the power to make a ruling thereon, and was of no effect.

Section 662 of the Code of Civil Procedure was added by the Legislature in 1929 (Stats. 1929, p. 843), and provides: "In ruling on such motion [for a new trial], in a cause tried without a jury, the court may, on such terms, as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission

thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

It is the plaintiffs' contention that the language of the section does not give the court the power to change the findings and modify its judgment so as to make a new or different judgment unless a new trial be granted. But we do not find the difficulty in construing the language of the section which the plaintiffs seek to create. The obvious purpose of the statute, discerned from the language employed, was to give to the court, on denying the motion for a new trial, the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. This was to subserve the ends of justice and to prevent unnecessary delays in cases where the court deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law. Where the question of the extent of the power of the court under the section has previously been considered, the reviewing courts have felt no hesitancy in holding that the trial court had such a broad power under the provisions of the section. Moore v. Levy, 128 Cal.App. 687, 696, 18 P.(2d) 362; Veterans' Welfare Board v. Burt, 4 Cal.App.(2d) 659, 41 P.(2d) 587; R. Barcroft & Sons Co. v. Cullen, 213 Cal. 208, 2 P.(2d) 353; Meda v. Lawton, 214 Cal. 588, 591, 7 P.(2d) 180. The cases decided prior to the enactment of section 662 in 1929 cannot control the court in the exercise of its power under the new section.

[2, 3] The findings of fact and conclusions of law were changed and the judgment was modified by formal documents signed by the judge on or before August 16, 1932, when, according to the record, the plaintiffs' counsel acknowledged service of copies thereof signed by the judge. They were dated August 3, 1932, which was the date of the minute order, and may be deemed effective as of that date. Barbee v. Young, 79 Cal.App. 119, 124, 125, 249 P. 15. The fact that they were not filed until September 13th would not destroy the power theretofore exercised within due time. Section 662 of the Code of Civil Procedure sets no limit on the time when the court, after pronouncement of its determination, must sign and file its order. De Arman v. Connelly, 134 Cal.App. 173, 180, 25 P.(2d) 24. The language of section 660 of the Code of Civil Procedure indicates that, so long as the court "passes" on the motion within the sixty-day period, it has lawfully exercised its jurisdiction to determine the motion, and the filing of the formal order or findings and judgment "thereafter," when the time of filing is subsequent to the last day of the sixty-day period, does not amount to a denial of the motion by operation of law. Holland v. Superior Court, 121 Cal.App. 523, 531, 532, 9 P.(2d) 531.

[4] The other principal contention on this appeal is that the evidence does not support the modified findings and judgment that the defendants did not sustain a partnership relation with Lang and that therefore C. D. Lang alone was liable on the obligations. Each of the other defendants paid to Lang amounts ranging from $100 to $15,000 pursuant to a contract which provided that the landowners were to receive 16⅔ per cent. of the well, and that C. D. Lang was to receive 12 per cent. for the use of rotary apparatus and 2 per cent. for supervision, before the defendants should be repaid. Out of the next proceeds the defendants were to receive back the principal of the sums paid by them. The remaining percentage was to be considered as profit, and was to be divided one-half to Lang, the owner of the lease, and the other half to the defendants proportionately. It was expressly provided that, except for the percentage for the use of the rotary and for supervision, the lease owner was to receive nothing until the defendants had been repaid the principal of the sums received from them. The defendants did not participate in the conduct or management of the business of drilling the wells, and concerted action in the management, control, or carrying on of the business was not contemplated by the contract. The court could fairly conclude from the evidence that none of the defendants was ever on the ground for any such purpose and that the plaintiffs did not deliver materials on the faith of the defendants' personal credit. The question whether a partnership or the relation of joint adventurers was created was primarily a question for the trial court to determine from the facts and the inferences to be drawn therefrom. Oscar Krenz Copper & Brass Works, Inc., v. England, 109 Cal.App. 747, 751, 293 P. 689, and cases cited. Its conclusion herein has support in the record even with the ad-

ditional facts appearing, viz., that some of the defendants were members of the family and one of the family names, to wit, Wall, was included in the fictitious company name; and that some of the defendants advanced further funds when such were needed.

[5, 6] The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced. Vanderhurst v. De Witt, 95 Cal. 57, 62, 30 P. 94, 20 L.R.A. 595; Coward v. Clanton, 122 Cal. 451, 454, 55 P. 147; People's Lumber Co. v. McIntyre & Peters, 179 Cal. 780, 178 P. 954; Martin v. Sharp & Fellows Contracting Co., 34 Cal.App. 584, 168 P. 373; Auditorium Co. v. Barsotti, 40 Cal.App. 592, 181 P. 413; Oscar Krenz Copper & Brass Works, Inc., v. England, 109 Cal.App. 747, 293 P. 689; Black v. Brundige, 125 Cal.App 641, 13 P.(2d) 999. The foregoing conclusion and cited cases are in conformity with the definition of the partnership relation contained in the Civil Code (section 2400, Stats. 1929, p. 1898, formerly contained in section 2395), which includes as an essential element the joint participation in the conduct of the business. The presence of the same element is necessary to constitute the parties joint adventurers. See, also Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77; Peirce v. McDonald, 168 App. Div. 47, 153 N.Y.S. 810; Farmers' Co-op Elevator Co. v. Farmers' Union Co-op. Exchange, 127 Okl. 275, 260 P. 755; Gille Hardware & Iron Co. v. Harrison, 89 Mo. App. 154; Cudahy Packing Co. v. Hibou, 92 Miss. 234, 46 So. 73, 18 L.R.A.(N.S.) 975.

[7] The plaintiffs urge that subdivision (4) of section 2401 of the Civil Code, providing that the receipt by a person of a share of the profits of a business is prima face evidence that he is a partner, has some controlling weight in this case. It has no bearing, however, in the absence of any evidence that profits were received, and there is no evidence of the payment of any to the defendants. Furthermore, when the facts warrant its application, that subdivision is to be construed and applied in connection with subsection (d) thereof, which provides that such an inference is not to be drawn where the profits were received as interest on a loan, although the amounts vary with the profits of the business.

The foregoing disposes of all of the questions raised on the appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; CONREY, J.; LANGDON, J.



5 Cal.2d 68

BOYLES v. KINGSBAKER BROS. CO.

L. A. 15422.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Jan. 30, 1936.

1. Appeal and error ⇐1010(1)

Supreme Court may not overthrow judgment of trial court on decision on questions of fact, unless there is want of evidence to support judgment.

2. Sales ⇐383

In action for breach of contract to buy pears, evidence *held* to support finding that pear market sharply declined following execution of contract so as to entitle plaintiff to damages for breach thereof in amount of difference between contract and market price.

3. Sales ⇐72(4)

Contract for sale of "No. 1 grade" pears *held* to provide for grading by test adopted by federal and state departments of agriculture and recognized by industry rather than one which was only locally known.

4. Sales ⇐383

In action for breach of contract of sale of "No. 1 grade" pears, evidence *held* to support judgment for grower based on finding that pears delivered by grower were of quality specified in contract.

5. Sales ⇐17

Grower of pears *held* entitled to maintain action for breach of contract for sale of pears which had been executed by defendant and brokerage firm representing grower, where

defendant knew of grower's identity and of custom in trade to sell through brokerage firms on brokerage basis, and negotiated with grower as owner during transaction.

6. Sales ⇐119

Under contract for sale of pears in carload lots, buyer *held* not entitled to rescind entire contract for failure of first two carload shipments to conform to contract, where dispute as to quality of fruit in first shipment was compromised by parties and remainder of shipments were of specified quality.

7. Sales ⇐383

In grower's action for breach of contract to buy pears, evidence *held* insufficient to establish rescission of contract by mutual consent of buyer and salesman of brokerage firm through which pears were sold, where lack of salesman's authority to cancel contract was known to buyer who dealt with grower of pears as owner throughout transaction.

8. Sales ⇐384(2)

In action for breach of contract to buy pears, difference between contract price and price which fruit should have brought on open market at place of delivery with consideration to cost of marketing *held* proper measure of damage.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by E. A. Boyles against the Kingsbaker Bros. Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 45 P.(2d) 418.

Lawler & Degnan, of Los Angeles, for appellant.

Hinsdale, Otis & Johnson, of Sacramento, and Moote & Longcroft, of Los Angeles (Robert W. Jennings, of Sacramento, of counsel), for respondent.

SEAWELL, Justice.

The plaintiff obtained judgment for breach of contract for the sale and purchase of a crop of Bartlett pears.

[1] The questions presented upon appeal are mainly questions of fact. This court may not overthrow the judgment of the trial court in its decision on questions of fact unless there is a want of evidence to support the judgment.

The major question involved is whether the pears which were sold under a certain contract met the requirements thereof as to size, quality, shape, and condition, interpreted, of course, with a consideration of the general rules and customs which are commonly recognized by the industry or trade in the standardization of such fruits.

Said contract was apparently written upon the stationery of the California Fruit Exchange and is dated Los Angeles, July 17, 1930. Omitting descriptive matter not material to the subject-matter of the contract, it is in form and words as follows:

"Confirmation of Sale.

"Kingsbaker Bros. Co., Los Angeles, California.

"Gentlemen: The California Fruit Exchange confirms sale to you of Mr. Boyles' Bartlett pears from the Ione ranch, to be put up in unlabelled new wood, stencilled California Fruit Exchange, packed two layers, stems up, sizes 2¼" and larger, number one grade pears. The contract covers the entire crop of Mr. Boyles' Ione pears, estimated at 150 tons. Shipment when pears are ready. Price $70 per ton F. O. B. shipping point on shipping point weights. Wood free. Shipment under standard refrigeration.

"Very truly yours,
"F. B. Henney
"Frank B. Henney.
"Kingsbaker Bros. Co.
"By Harry B. Kingsbaker.
"FBH–mm."

The California Fruit Exchange is a corporation with its home office at Sacramento and a branch at Los Angeles. Other organizations, such as the Sacramento River Association, are units of the parent body.

The plaintiff, E. A. Boyles, is admittedly well known as a grower of superior Bartlett pears and has been active in the organization of co-operative associations of that industry for a number of years in Northern California fruit areas. His ten-acre orchard from which the pears in suit were produced is located near the town of Ione, Amador county. The excellent quality of his pears was known to Mr. H. Kingsbaker, whose name appears on the contract, at and before the time he signed it on behalf of Kingsbaker Bros. Company, a corporation of which he was an officer. Said corporation was engaged in the wholesale business of buying and selling fruits and vegetables, with its office at Los Angeles. Mr. Frank B. Henney, acting for

the California Fruit Exchange in confirmation of the sale, is by occupation a fruit broker or sales agent. He had been in the employ of the California Fruit Exchange for a number of years as a buyer of fruit. He received no salary. His compensation was based solely upon his "sales per car." Whether his transactions were subject to confirmation of the California Fruit Exchange (which will hereafter be referred to as the exchange), or whether his authority was absolute in the buying of fruit is not made clear. It appears from the record that Kingsbaker Bros. Company was one of his best customers and that he had sold hundreds of carloads of fruit to that corporation.

[2] The contract before us was made on July 17, 1930, at a time when the market was near its peak. Early in July a carload of Gridley pears had sold for $115 per ton delivered in Los Angeles. The early fruit always brings the highest prices. About July 26 the market gave signs of weakening, and there was a sharp decline in prices below the contract price during the balance of the season, as testified to by a number of fruit brokers who seemed to have been well informed as to the actual pear market, not only in the city of Los Angeles, but throughout California and the nation. These witnesses seemed wholly disinterested as to the result of the suit. The evidence in this case seems to decidedly preponderate in favor of the claim of plaintiff that a price of $70 per ton—plus $15 per ton for transportation from Ione, making the cost to defendant delivered at Los Angeles $85 per ton—was not obtainable for pears of the highest grade in the Los Angeles market, or any market, subsequent to the 26th day of July, 1930. Plaintiff, Boyles, was manager of the Sacramento River Association in 1930, and he testified, without any attempt being made to impeach his testimony in this particular, that the 1930 crop was the largest Bartlett pear crop the state had ever produced and that 31,000 tons of Bartlett pears went unharvested that year. He further testified that on August 1, by reason of the overproduction, the market took a "flop" and "there was little in pears that year"; that the market broke badly all over the United States; that about the middle of July pears were selling for $3.50 to $4 per standard box, but on July 26 the market dropped to one-half of the above amount, making a 50 per cent. decline. On the issue as to a very sharp decline in prices as compared with the contract price, the plaintiff's testimony is corroborated by H. S. Myers, manager of the Consolidated Produce Company of Los Angeles, with 28 years' experience in the produce business at Los Angeles. His testimony as to the market was based upon sales actually made by his concern. He submitted the following figures on sales which were within his personal knowledge: On August 2, a carload of Martinez Valley pears sold at $70 per ton f. o. b. Los Angeles, or $55 per ton f. o. b. shipping point; August 4, another carload at $65 f. o. b. Los Angeles or $50 at shipping point; August 8, another carload at same price; August 4, Gridley pears sold $40 per ton f. o. b. Gridley or $55 at Los Angeles; August 7 and 8, Gridley pears sold for $60 a ton f. o. b. Los Angeles—$45 at Gridley; August 4, sold carload for $50 f. o. b. Los Angeles; August 5, sold carload at $50 per ton f. o. b. Los Angeles; August 11, $60 f. o. b. Los Angeles; August 12, $62 at Los Angeles. Said witness testified that the above-quoted figures were the going prices for U. S. No. 1 grade pears, which is the best grade of pears placed on the market and outranks the Blue Anchor brand. It is the claim of defendant that the Blue Anchor No. 1 grade is a higher grade than the U. S. No. 1 and that the allowance for defective fruit is but 5 per cent., while the U. S. No. 1 grade is 10 per cent. for defective fruit. These claims are refuted by testimony given by witnesses for the plaintiff. It was stipulated that Mr. Evan would give the same answers to the questions as were given by Mr. Myers. N. J. Parr, an employee of Byron, Green Packing Company at San Jose, Cal., and who has been in the pear industry for 15 years, corroborated Mr. Boyles as to the pear production of 1930 and the consequent decline of pears in the market. He testified that the crop was the largest the state had ever produced and the finest grade of pears sold on August 9 brought $35 per ton shipping point. His firm bought 700 tons at that figure. Later in August, Lake county Bartletts, which are a very high grade, sold at $30 per ton, due to overproduction. There can be no question but that there is very persuasive evidence in the case coming from men actually engaged in the buying and selling of Bartlett pears in the markets of the state and elsewhere that the market suffered a decided decline by reason of overproduction shortly after the contract herein was executed. Defendant offered certain daily mar-

ket reports by which it was sought to show that the market, following the day the contract was executed, equalled, if it did not exceed, the contract price. These reports are made up from information obtained from dealers, railroads, and truck companies, and there is little room for doubt that they are but estimates, more or less conjectural, and are easily subject to market manipulation. In the instant case buyers and sellers of pears who were actually engaged in daily transactions testified that a material drop in prices followed the execution of the contract, and, the jury and trial court having inferentially passed upon this issue, we are concluded by their finding. There is ample substantial evidence in the record sustaining the finding.

[3] It is vigorously contended that the pears were not of the grade described in the contract, and that the minds of the parties did not meet by reason of a failure to more specifically describe the grade of pears bargained for. Defendant contends that he had in mind the pears known as Blue Anchor No. 1 grade. There is such a grade of pears, which was established by the California Fruit Exchange, and it is defendant's claim that said grade is superior to all other grades and that was the grade of fruit it had in mind and believed that it was buying. In addition, defendant asserts that the fruit shipped to it would not pass as "number one grade pears," tested by any known method of fruit standardization. Defendant also claims that a rescission of the contract was made by it shortly after the receipt of the sixth car by a letter which it addressed to the exchange dated August 8, the material portion of which reads: "Inasmuch as a number of cars have been shipped and rejected owing to the fruit not being of a number one grade, we now consider this contract at an end." The claim of defendant that the fruit was to be of the grade known as California Fruit Exchange Blue Anchor No. 1 grade nowhere appears in the contract, but it is nevertheless contended that Blue Anchor No. 1 grade was a product of California Fruit Exchange and is known in the Los Angeles market as a superior grade. Evidence was taken on this issue, and the preponderance of the evidence is against the defendant's claim as to its superiority. In fact, there is evidence flatly contradicting the claim. Mr. Boyles, who is an officer of a pear association which is a unit of the parent body, the exchange, testified that the U. S. No. 1 was the highest grade of pears to be found in the market. All of his shipments were of that grade. He further testified that he and F. W. Read, who at the time of trial directed the standardization work for the exchange, established the Blue Anchor No. 1 grade. He testified that the "specifications for Blue Anchor grade, in the case of pears, is identical with the U. S. No. 1 grade of pears. U. S. Grade No. 1 meets Blue Anchor brand in all particulars, and Blue Anchor is our highest grade." Mr. Read testified to his long acquaintance with Mr. Boyles and stated that the exchange had marketed his pears "throughout the United States and foreign countries for many years." He also testified that the exchange "handles all goods for the account of the grower. We buy nothing. We handle them on a straight commission business." W. F. Allewelt, supervisor for the United States Department of Agriculture and the California State Department of Agriculture fruit and vegetable inspection service, testified: "U. S. Grade No. 1 is the highest specific standard of pears entering into commercial channels in the state." It is the "basis used in the Federal certification and inspection in this state, on pears as on other products." He further testified that the gradings of Blue Anchor and U. S. No. 1 are identical, including the tolerance differential.

It is the testimony of Mr. Read, in charge of the field and standardization work of the exchange which established the Blue Anchor No. 1 grade and who formulates the rules which govern that pack, that the U. S. No. 1 grade and the Blue Anchor No. 1 grade of 1930 were identical. There is other evidence in the case which tends to support the contention of plaintiff that the two grades of pears are practically identical. The U. S. No. 1 grade is unquestionably much more generally known to the trade. In fact, there is testimony to the effect that the Blue Anchor is a grade or brand originating within the exchange organization and is not generally or widely recognized in the trade.

Appellant's effort at the trial was to so interpret the contract as to subject the quality of the fruit to the test of Blue Anchor No. 1 grade for the reason—as it contends—that the differential of 5 per cent. only was allowed by this grade for defective pears, whereas the U. S. No. 1 grade test allows a 10 per cent. differential for defective fruit. The custom of the trade is that some allowance must be made for defective fruit, for the reason, as pointed out by packers and growers, that it is not possible to grow, pick

and ship a carload of fruit that will average higher than 80 per cent. perfect as measured by the rigid inspection to which the higher grades are subjected. However, we have quoted the testimony of witnesses, and there are others whom we have not specifically named, which would certainly sustain a finding that the U. S. No. 1 grade is the common grade which obtains in the markets of this state, and that it ranks as high as the Blue Anchor grade in every material respect. There is a conflict as to whether the Blue Anchor allowed as great a differential for defective fruit as the U. S. No. 1. Two or three witnesses testified that in the final analysis they were the same in that respect. But there is nothing in the term used in the contract, to wit, "number one grade pears," that would permit the appellant to apply a test which is only locally known as against one that is adopted by the federal and state departments of agriculture and recognized by the industry. No convincing parol evidence was offered to sustain such a claim. In fact, there is no ground supporting the contention that the pears were to be of any other quality than "number one grade pears," as stipulated in the contract. The quality and condition essential to constitute a number one grade of pears is clearly a matter of evidence. Of the two standards contended for by the respective parties as to the proper criterion by which the pears should be measured, the one established by the federal government and adopted by the state authorities should certainly prevail over one of a less general application in the determination of the question whether the pears were "number one grade pears" within the specifications of the contract. The real crux of the case and the point to which the volume of evidence was directed was whether the pears were of the size, shape, and condition to entitle them to be classified as No. 1 grade.

[4] The transaction includes the shipment of eleven carloads of fruit from Mr. Boyles' orchard. The number of tons rejected and for which damages are asked is approximately 95. The first carload was shipped from Ione July 20. It was inspected at Los Angeles upon arrival by Mr. Kingsbaker and Mr. Henney. Many objections were made to the shipment by Mr. Kingsbaker as to color, form, and immaturity of the pears. He asserted that it was not the grade of fruit he contracted to buy. However, he and Mr. Henney arrived at an agreement, and Mr. Kingsbaker accepted the shipment at the agreed price of $65 per ton. Mr. Kingsbaker also made objection to the second carload of fruit on various grounds, but said it was a better grade than the first and paid the contract price. The third car arrived a few days later, and, after inspection by Mr. Henney and Mr. Kingsbaker, it was rejected. The fourth car arrived in due course, and, after inspection by Mr. Kingsbaker, it was also rejected as not being up to grade. His testimony was to the effect that Mr. Henney said he could not expect him to accept the shipment as it was not the fruit he had contracted to buy. He said to Mr. Henney that four cars had been shipped and he considered none a delivery; that he would consult an attorney and inform himself as to whether the exchange had not broken its contract; that, if he relied upon the exchange, he would be without fruit; that, if any more shipments arrived of the quality of the others, he would not accept them. Mr. Boyles was informed of the complaints made by Mr. Kingsbaker, and he arrived in Los Angeles on August 6. He inspected the third car with Messrs. Kingsbaker and Henney, and insisted that that car and all other fruit was well within the requirements of the contract. Two days after the inspection made by all the parties in interest, Mr. Kingsbaker wrote the letter to the exchange, above set out at length, in which he notified the exchange that "we now consider this contract at an end." The letter was forwarded to Mr. Boyles at Sacramento by the exchange, and on August 18 he addressed a letter to Kingsbaker, the material portion of which is as follows:

"In your letter dated August 8, 1930, you state that

"'Inasmuch as a number of cars have been shipped and rejected owing to the fruit not being of a number one grade we now consider this contract at an end.'

"Please be advised that all pears heretofore shipped to you have been of number one grade. This is to also notify you that I shall at the earliest practicable moment, sell on the open market for the highest price obtainable all of the pears covered by the contract and then unpaid for and shall credit you with the net proceeds. That if the net proceeds amount to more than the sum due under said contract I shall remit the excess to you. But if said net proceeds amount to less than the sum due under the contract I shall hold you

for the difference and in the event that said deficiency not being promptly paid by you I shall, much to my regret, be compelled to enforce payment by due process of law."

Other shipments arrived, were inspected, and rejected by defendant or his employee.

After Mr. Boyles' arrival and conference with Mr. Kingsbaker, he still entertained the opinion that the fruit was well within the provisions of the contract, but, because he felt that he was at a disadvantge in assembling the evidence and presenting the facts as fully as he thought the case warranted, he acceded to the settlement made as to the first shipment. He was influenced to do so because he was not certain that he had at hand sufficient evidence to successfully controvert the representations made by Kingsbaker. Acting upon the conviction that the fruit was in every respect up to grade, he employed two United States and state inspectors to inspect each carload of fruit thereafter shipped. Two federal and state inspectors who made official examinations of the fruit, and the superintendent who had charge of the shipments examined the pears personally, and all were unanimously of the opinion that the pears were well within the classification of the No. 1 grade. The only witnesses who entertained a contrary opinion were defendant Kingsbaker, broker Henney, who had large business transactions with the defendant, and a United States inspector. The latter was not altogether an adverse witness to plaintiff. He gave the fruit an 85 per cent. grade and reported that 3 per cent. of defects were bruises made in transit; 2 per cent. mechanical injury. He concluded his report by the finding that, if there were no mechanical bruises, the pears may well have scored 92 per cent. at shipping point. The grades of the two carloads of pears shipped to New York City, for the reason that the market had dropped to a low ebb in Los Angeles, is equally favorable to plaintiff upon every controverted issue of prices or grades of fruit.

We have not referred to all the evidence in the case which tends to show the existence of a conflict in the evidence, which is all that is necessary to compel an affirmance of the judgment, but we might go further and show that the judgment is supported by much substantial evidence which seems to preponderate in favor of the judgment.

[5] We find no substantial merit in the claim that the action was not maintainable by Boyles because the contract was made in the name of the California Fruit Exchange. There can be no doubt that defendant well knew that the owner of the pears was Mr. Boyles. The contract itself describes the fruit as Boyles' pears, coming from his orchard, and it is generally known in trade circles that brokers bargain for the sale of the owners' products on a brokerage basis. This was true of the exchange. The defendant and the California Fruit Exchange had had many business transactions through the years, and each was familiar with the methods of doing business on a brokerage basis. Besides, early in the transaction Kingsbaker treated with Boyles as the owner at the time Boyles appeared in protest of Kingsbaker's claim to the effect that the fruit was not up to grade. Later he received a letter from Boyles in which he was threatened with suit unless he made prompt payment for the fruit in accordance with the terms of the contract. He did not question Boyles' ownership at times when he was called upon to do so. Boyles' orchard was well known to him for the excellence of its production, and the exchange, as he must have known, was but the means of transferring possession from the owner to the buyer. He first raised the question after action was filed. The case was tried upon the theory that Boyles was the owner of the pears and defendant suffered no surprise or prejudice by the fact that the contract was made in the name of the exchange, which was the agent of Boyles.

[6] It is contended by appellant that the rule announced in cases where a person who contracts for the delivery of goods or property of a certain quality and description may refuse to accept any part of the property or goods unless all of them are in accordance with the contract should rule the instant case, citing as supporting authorities Morrison, McIntosh & Co. v. Leiser, 73 Mo.App. 95; Lindsborg Milling & Elevator Co. v. Danzero (Mo.App.) 193 S.W. 606; Louisville Packing Co. v. Crain, 141 Ky. 379, 132 S.W. 575. It is not necessary to decide whether the rule announced above, which may have been applicable to the facts of the cited cases, is a proper criterion for the interpretation of the contract in the instant case. Whatever fault Mr. Kingsbaker may have found

with the first or second carload of fruit became a closed chapter by mutual agreement between Mr. Kingsbaker and Mr. Boyles, the owner of the fruit. Their compromise of matters involved in that dispute could not form the basis of a new complaint or enter into a future controversy, as it was settled with the consent of all without any intimation on the part of Mr. Kingsbaker that he regarded it as grounds for declaring the contract at an end. It is true he expressed himself as dissatisfied with the fruit. On the other hand, Mr. Boyles maintained that the fruit was well within the contract from the first to the last carload. The acts of Mr. Kingsbaker looking to a refusal to accept any more fruit did not become manifest until after the arrival of the third and other carloads which followed. If car 3 and the others were within the grade provided in the contract, and there is undeniably evidence in the record to that effect, then the question as to whether Mr. Kingsbaker did or did not make a rescission which met the form and requirements of law is wholly out of the case. If the fruit was up to grade, as found by the trial court, there was no other alternative left but to pay the contract price.

[7] As to the claim that the contract was rescinded by the mutual consent of Mr. Kingsbaker and Mr. Henney, we find nothing in the record granting Mr. Henney, who was a mere broker and salesman for the exchange, such power. Neither did he openly attempt to rescind. It is true that he did give testimony to the effect that in his opinion the pears were not up to the grade called for by the contract, but it cannot be said that he assumed the responsibility of cancelling the contract. In fact, he made it clear to Mr. Kingsbaker that he had no such authority. He conferred with both Mr. Boyles and the exchange on important phases of the transaction. Mr. Kingsbaker must have known from the contract and from his conference with Mr. Boyles very early in the transaction that the title to the pears was in Mr. Boyles.

The appellant suffered no prejudice by reason of the court's charge or its refusal to give any instruction requested by it.

[8] All of the rejected fruit was sold on the open market at a price less than the contract price. The difference between the latter price and the prices which the pears should have brought in the open market at Los Angeles, giving consideration to the cost of marketing, was held properly to be the criterion of damage. Two carloads were shipped to New York City for reasons already stated, were there inspected, and found to be No. 1 grade.

We find no sufficient reason for disturbing the judgment.

It is therefore affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.



4 Cal.2d 697

MERIWETHER INV. CO., Limited, v. LAMPTON, County Clerk (CITY OF LOS ANGELES, Intervener).

L. A. 15397.

Supreme Court of California.

Dec. 18, 1935.

1. Municipal corporations ⇐923

Bond representing a street assessment is a "contract," and law in force at time of levy of assessment and issuance of bond prescribing manner of its enforcement is part of such contract.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

2. Constitutional law ⇐169

Every change in remedy by which an obligation may be enforced does not fall without terms of constitutional prohibition against enactment of a law impairing obligation of contracts, as law providing remedy for enforcement of contract is as much a part of contract as any other legal requirement affecting contract (Const.Cal. art. 1, § 16; Const.U.S. art. 1, § 10).

3. Constitutional law ⇐144

In determining whether amendments to statutes providing for foreclosure of street improvement bonds unconstitutionally impaired obligation of contracts, as respects bonds issued prior thereto, determinative factor was whether amendments affected bondholder's substantial rights under contract rather than whether amendments merely affected bondholder's remedy (St. 1923, p. 278, § 63; St. 1927, p. 1410, § 62; St. 1929, p. 1306, § 76a; St. 1933, pp. 2386, 2387, 2628, §§ 62.

63; p. 2392, § 76b; Const.Cal. art. 1, § 16; Const.U.S. art. 1, § 10).

4. Constitutional law ⇐144

Statute requiring, prior to entry of decree foreclosing lien of street improvement bond, payment to city of penalties upon bond, delivery of bond to city treasurer for cancellation and delivery of certificate of cancellation to county clerk, *held* invalid as impairing bondholder's contract, as respects its application to bonds issued prior to effective date of statute (St. 1923, p. 278, § 63; St. 1927, p. 1410, § 62; St. 1929, p. 1306, § 76a; St. 1933, pp. 2386, 2387, 2628, §§ 62, 63; p. 2392, § 76b; Const.Cal. art. 1, § 16; Const.U.S. art. 1, § 10).

5. Municipal corporations ⇐907

Where, at time of commencement of bondholder's action to foreclose lien of street improvement bond, statutory amendments had effected repeal of provisions of statute providing for payment to city of half of penalties upon bond, city was not entitled to recover any part of such penalty, notwithstanding bond was issued prior to amendment of statutes (St. 1923, p. 278, § 63; St. 1927, p. 1410, § 62; St. 1933, pp. 2386, 2387, 2628, §§ 62, 63).

6. Constitutional law ⇐104
Penalties ⇐2

There can be no vested right in an unenforced penalty, and, consequently, a repeal, before final judgment, of a statute imposing a penalty destroys right of action thereon, and if, after judgment of a lower court, a case is appealed, appellate court must, where law is changed pending appeal, dispose of case under law in force when its decision is rendered.

7. Constitutional law ⇐104

City had no vested right, which could not be taken away, under statute providing for assessment of penalty against property owner on foreclosure of street improvement bond and for payment of half of penalty to city, since penalty was creature of statute and no contractual right existed between city and either party to bond (St. 1923, p. 278, § 63; St. 1927, p. 1410, § 62; St. 1929, p. 1306, § 76a; St. 1933, pp. 2386, 2387, 2628, §§ 62, 63; p. 2392, § 76b).

8. Evidence ⇐18

Supreme Court may take judicial notice that excessive bond issues which were made liens upon realty during recent years constituted such a burden upon realty of state that owners thereof were unable to meet their obligations without serious property loss.

9. Municipal corporations ⇐955(1)

Legislature, in amending statutes relating to foreclosure of street improvement bonds, abolished city's right to any penalty under existing and subsequent bond issues, and hence no duty rested upon bondholder to comply with statute requiring, prior to entry of decree foreclosing lien of bond, payment to city of penalty upon bond, delivery of bond to city treasurer for cancellation and delivery of certificate of cancellation to county clerk (St. 1923, p. 278, § 63; St. 1927, p. 1410, § 62; St. 1929, p. 1306, § 76a; St. 1933, pp. 2386, 2387, 2628, §§ 62, 63; p. 2392, § 76b).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandate by the Meriwether Investment Company, Limited, against L. E. Lampton, as county clerk and ex officio clerk of the superior court of the state of California, in and for the county of Los Angeles, in which the City of Los Angeles intervened. From a judgment denying the writ of mandate, petitioner appeals.

Reversed, with directions.

Prior opinion, 45 P.(2d) 256.

Roscoe R. Hess, of Los Angeles, for appellant.

Solon S. Kipp, of San Diego, amicus curiæ.

Everett W. Matton, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for intervener.

PER CURIAM.

Appellant was the owner of a street improvement bond of date May 19, 1931, issued under the Improvement Act of 1911. (St. 1911, p. 730, as amended.) It instituted an action to foreclose said bond in the superior court of the county of Los Angeles in pursuance of section 76a of said act, as added by St. 1929, p. 1306, and on November 29, 1933, secured a judgment by default foreclosing said bond, which judgment was on said day signed by the judge of said court and filed with the respondent, L. E. Lampton, as clerk of said court, together with a demand that said respondent clerk enter said judgment in the judgment book

of said court. This demand the respondent refused to comply with, basing his refusal upon the failure of appellant to deliver to said respondent clerk a certificate of cancellation of said street improvement bond issued by the city treasurer of said city, and for failure to pay to said city treasurer any portion of the penalties accruing on said bond. Appellant thereupon petitioned the superior court for a writ of mandate directed to the respondent clerk requiring him to enter said judgment without the delivery of said certificate of the city treasurer as required by section 76b of said act, as added by St. 1933, p. 2392. The trial court refused to issue said writ, and from its judgment the said petitioner has appealed.

Section 62 of said act, as amended by St. 1927, p. 1410, provided, at the date of the issuance of said bond that: "Should any payment of principal of said unpaid assessments or of interest thereon be not paid on the date upon which the coupon or coupons representing it are payable, the city treasurer shall after the close of business on said due date add to the amount of principal or interest so delinquent a penalty of five per cent of the total amount of such delinquency, and at the beginning of business on the first day of each succeeding month until such delinquent payment and all penalties thereon be fully paid, he shall add an additional penalty of one per cent of the amount of such delinquency and said treasurer shall collect such penalties with and as a part of such delinquent payments."

Section 63 of said act, as amended by St. 1923, p. 278, provided that, among the provisions to be inserted in the bond representing said assessment, there should be one reading as follows: "In case of such default [in the payment of the bond] there shall be immediately added to such defaulted amount, five per cent of the amount thereof, and on the first day of each month following such default there shall be added a further penalty of one per cent of such defaulted amount. The city shall be entitled to one-half the penalty first imposed, namely, two and one-half per cent and the other two and one-half per cent and all subsequent penalties shall be paid to the holder of the bond along with and as a part of such defaulted payment."

While these sections were amended in 1933 (St. 1933, pp. 2386, 2387, 2628) and in their amended form provided that the bond should contain a provision which reduced the 5 per cent. penalty to 1 per cent., and that the whole penalty should be paid to the bondholder, the parties hereto have argued the case principally on the assumption that the amended sections have no bearing upon any question presented on this appeal. They have only incidentally raised the question as to the effect of these amendments. We will first discuss the case as argued by the parties, but will later on in this opinion give our views as to the effect of these amendments.

Section 76a of said act, as added by St. 1929, p. 1306, under which this action was instituted provided for the foreclosure of bonds issued in pursuance of its terms by action in the superior court, and further provided, "the court in said suit shall have the power to adjudge and decree a lien against the lot or parcel of land covered by said bond and to cause said premises to be sold as in other cases of the sale of real estate by the process of said court to satisfy and discharge such bond and lien, and the amount of interest and penalties due shall be calculated * * * up to the date of the judgment."

At the session of the 1933 Legislature, the Improvement Act of 1911 was amended by the addition thereto of a new section numbered 76b (St. 1933, p. 2392). This section became effective on June 13, 1933, which date was subsequent to the date of said bond but prior to the date of said judgment of foreclosure. By this section it was provided that whenever a bond is foreclosed through the superior court it shall be the duty of the plaintiff or his attorney to deliver said bond to the city treasurer of the city which issued the bond, and he shall pay to said treasurer the penalties due said city under the provisions of section 63 of said act. It shall then be the duty of the city treasurer to cancel said bond and to deliver to the plaintiff or his attorney a certificate that he has received said bond, and the city's share of the penalties accrued by reason of its delinquency, and that he has canceled said bond on his records. This section further provides that the county clerk shall not enter the decree or judgment of

foreclosure until the plaintiff or his attorney shall have delivered to him said certificate of cancellation.

[1] From the foregoing, it will be seen that by section 76b an additional duty is required of the bondholder over that imposed upon him as the act was in force when the bond was issued. Under section 76b the bondholder is required to do the following acts which he was under no duty to perform prior to its amendment: Surrender the bond to the city treasurer, pay to the city treasurer the penalties due the city, and upon the city treasurer showing that he has canceled the bond, present to the county clerk (clerk of the court) the certificate of the city treasurer showing such cancellation. These acts must all be performed by the bondholder after he has secured a judgment of foreclosure and before he can have said judgment entered by the clerk of the court. It is contended by the appellant, the owner of the bond in said foreclosure action, that section 76b, if applied to proceedings to foreclose bonds issued prior to the enactment thereof, is unconstitutional in that it impairs the obligation of the contract under which it became the owner of said bond. On the other hand, respondent clerk and the city of Los Angeles, the latter having intervened in the case, contend that the changes in the Improvement Act brought about by the enactment of section 76b pertain exclusively to the remedy of the bondholder and was, therefore, within the power of the Legislature to enact. That this section casts upon the bondholder an additional burden not required of him prior to its enactment must be conceded. Under its terms he is required to advance the city's half of the penalty before his judgment may be entered. The advancement of this money might of itself be a burdensome requirement of the bondholder. But the mere advancement of the penalty is the least of the burden which section 76b casts upon the bondholder. He has no assurance that the money so advanced by him will ever be repaid to him. Should the property which secures the payment of the bond not sell for an amount sufficient to pay the bond, principal, and interest, or only sufficient to pay such amounts, then neither the bondholder nor the city would be entitled to the payment of any part of the penalty. In such cases the bondholder, if required to advance the city's half of the penalty, would lose the entire amount of the money thus advanced. It has frequently been held in this state that a bond representing a street assessment is a contract and that the law in force at the time of the levy of the assessment and the issuance of the bond prescribing the manner of its enforcement is a part of the contract and controls the rights of the parties under the bond. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Jeffreys v. Point Richmond Canal & Land Co., 202 Cal. 290, 293, 260 P. 548.

[2] In considering the question as to whether the enactment of section 76b impairs the obligation of the contract, the bond, in this instance, it is well to bear in mind that not every change in the remedy by which an obligation may be enforced falls without the terms of the section of the Constitution prohibiting the enactment of a law impairing the obligation of contracts. The law providing the remedy for the enforcement of a contract is as much a part of the contract as any other legal requirement affecting the contract. Often a change in the remedy is as obnoxious to the constitutional provision as a change in the substantive law upon which the contract is based. This principle of law is well stated as follows: "It is provided in section 10 of article 1 of the Constitution of the United States that no state shall pass any law 'impairing the obligations of contracts,' and in section 16 of article 1 of the Constitution of the state of California that the legislature shall pass no 'law impairing the obligations of contracts.' The language of the two Constitutions is not ambiguous nor doubtful. Any law which impairs the obligation of a contract is prohibited. The restriction is not aimed solely at laws which expressly destroy or annul contracts, or in a certain degree impair their obligation, but, it applies to all laws which in any substantial degree impair the obligation of contracts. The question as to whether or not a law impairs the obligation of a contract is not always of easy solution. The provision of the Constitutions quoted, in its varied applications, has been the subject of more learning and discussion in the courts of the states and of the United States than perhaps any other constitutional provi-

sion. It is settled that all the laws of a state existing at the time a contract is made which affect the rights of the parties to the contract enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract. Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 18 L.Ed. 403; Brine v. Hartford Fire Ins. Co., 96 U.S. 627, 24 L.Ed. 858. The remedy, where it affects substantial rights, is included in the term 'obligation of a contract,' and the remedy cannot be altered so as to materially impair such obligations. Green v. Biddle, 8 Wheat. 1, 75, 5 L.Ed. 547; Edwards v. Kearzey, 96 U.S. 595, 600, 24 L.Ed. 793. In the latter case it is said: 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest.'" Welsh v. Cross, 146 Cal. 621, 624, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796.

[3] The question before us, therefore, is not so much whether the amendments of 1933 merely affected the remedy of the bondholder, as it is whether they affected its substantial rights under the contract. If the rights of either party to a contract are materially impaired by legislation enacted subsequent to the execution of the contract, the damage to the injured party is just as real and burdensome in the case where the legislation simply affects his remedy, as when it relates to some substantial right under the contract. Chapman v. Jocelyn, supra; Jeffreys v. Point Richmond Canal & Land Co., supra.

[4] The case of Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962, 963, supra, involved a proceeding to foreclose a street bond issued under the so-called Vrooman Act. There an attempt was made to apply an amendment to said act relative to proceedings to foreclose a bond issued prior to said amendment, which made material changes in the requirements concerning a sale. After holding that the bond constituted a contract, the court went on to say: "It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts, and can have only a prospective effect." Citing Houston v. McKenna, 22 Cal. 550, 553.

In the recent case of Jeffreys v. Point Richmond Canal & Land Co., 202 Cal. 290, 294, 260 P. 548, 549, supra, this court reiterated its position upon that question. That case involved a bond issue under the Improvement Act of 1911. As the act was originally enacted, the only procedure provided therein for the foreclosure of a bond upon default in its payment was by a sale of the property by the city treasurer. Subsequently section 76a was enacted providing a cumulative remedy of foreclosure by an action in court. It was held that the cumulative remedy was not applicable to bonds issued prior to the effective date of said section 76a. In holding that the new section, if construed retroactively, violated the contract of the property holder, the court said: "The rights of property owners against whose property assessments were levied and bonds issued under the 'Improvement Act of 1911' prior to the amendment of 1921 became vested under a statute which did not render them subject to any suit whatever in any court at the hands of a bondholder. While the Legislature had power to make retroactive a law relating purely to a remedy, it could not alter the substantive rights of the property owners or their successors in interest. The amendment we are considering, although nominally aimed solely at providing a remedy, in fact, changes a substantive right of the property owner, and therefore impairs, to the detriment of the property owner, the contract rights which became fixed when the street proceedings were taken and the bonds issued." In that case the amendment to the act related to the remedy only, but nevertheless it was held that even in such a case, if the substantial rights of the property owner were altered by such amendment, it could not legally be made applicable to existing contracts. Our present case is even stronger than the cited case. Under the act as it existed at the time the bond involved here-

in was issued, the holder thereof had the right to foreclose his bond after it became delinquent by an action in court without incurring any further obligation than that prescribed by the act as then in force. After the amendment, if made applicable to existing bonds, he must, before his judgment is entered, not only make additional advancements of funds, but he must do so without any assurance that he will ever be repaid the money so advanced.

The case of Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796, supra, is also in point. The question in that case involved the applicability of the law extending the time for redemption of real property sold under execution. It was held that such a law impaired the obligation of a mortgage executed before its enactment. It will be observed that all of these decisions involve statutes which affect the remedy providing for enforcement of the contract rather than any substantive part of the contract, but notwithstanding the nature of these statutes, they are held to be unconstitutional when their application to existing contracts would materially alter the rights or increase the burden of either party thereto. Measured by the law as thus announced, section 76b of the Improvement Act of 1911, which, as we have seen, casts upon the bondholder onerous burdens, not required of it at the time its bond was issued, before it can enforce collection of this bond, must be held not to apply to bonds outstanding at its effective date.

Respondents rely, in the main, upon the cases of Los Angeles Bond & Securities Co. v. Heath, 120 Cal.App. 328, 7 P.(2d) 1089, 1092, and Antoni v. Greenhow, 107 U.S. 769, 2 S.Ct. 91, 27 L.Ed. 468. The first of these two cases involves a change in the statute fixing the time in which an action may be brought to enforce the payment of an assessment levied in pursuance of the Improvement Act of 1911. It was held that such a change, like a statute enlarging or shortening the time when an action is barred by the statute of limitations, involves simply the remedy, which the Legislature may change, provided adequate means of enforcing the right remains. The court expressly distinguished that case from Welsh v. Cross, supra, upon the ground that in the latter case, "a substantive right of the judgment creditor was taken from him by the change in the law."

The decision of the court in the case of Antoni v. Greenhow, supra, was based solely upon the ground that the amendment to the statute involved therein affected the collection by the state of Virginia of the public revenue. To substantiate this statement, we only need to quote short excerpts from the opinion. On page 777 of 107 U.S., on page 98 of 2 S.Ct., 27 L.Ed. 468, the court said: "In this connection it must be borne in mind that the legislation, the validity of which is involved, relates alone to the collection of taxes levied under the authority of the state for the purposes of revenue. Promptness in the payment of taxes by the citizen is as important as promptness by the state in the discharge of its own obligations. In fact, ordinarily, the last cannot be done without the first. Hence, under the revenue system of the United States, the collection of the revenue in the manner prescribed by law cannot be restrained by judicial proceedings. The only remedy for an illegal exaction is payment under protest and suit to recover back the money paid. The reason is that as it is necessary the government should be able to calculate with certainty on its revenues, it is better that the individual should be required to pay what is demanded under the forms of law, and sue to recover back what he pays, than that the government should be embarrassed in its operations by a stay of collection." Continuing on page 778 of 107 U.S., on page 98 of 2 S.Ct., 27 L.Ed. 468, the court concludes as follows: "Looking at the case, therefore, as one affecting the collection of public revenue, we cannot see that the requirement of the advance of the taxes as a condition to the employment of the remedy is such an impairment of the contract as makes the requirement invalid." It is apparent from a reading of this opinion as a whole, that the Supreme Court of the United States did not intend to lay down a general rule governing the subject of impairment of contracts by legislation enacted subsequently, but, on the other hand, was making an exception to the general rule when the legislation in question related to the collection by the state of its public revenues. We think, therefore, that neither of these two cited cases governs the question involved in the present action.

[5, 6] We will briefly discuss the effect of the amendments of 1933 to sections 62 and 63 of said act. These amended sections, as we have seen, reduce the penalty on foreclosure of the bond from 5 per cent. to 1 per cent. and provide that the whole of it shall be paid to the bondholder. In other words, the former provisions of the act providing that the city shall be entitled to one-half of the 5 per cent. penalty is repealed. Therefore at the commencement of this action, there was nothing in the Improvement Act which provided for any penalty to be paid to the city on foreclosure of a bond issued thereunder. Under such circumstances, the city is not entitled to recover any part of said penalty. The law in this state is well and succinctly stated as follows: "It is a general rule that there can be no vested right in an unenforced penalty. Consequently, a repeal, before final judgment, of a statute imposing a penalty destroys the right of action thereon, and if, after judgment of a lower court, a case is appealed, the appellate court must, where the law is changed pending the appeal, dispose of the case under the law in force when its decision is rendered." 10 Cal.Jur., p. 983.

[7] Furthermore, the city had no vested right in this penalty which the Legislature could not take away prior to its collection. The penalty was purely a creature of the statute, and when the statute was repealed, or amended so as to do away with the penalty, the city's right thereto ceased. There was no contractual right between the city and either party to the bond. Hershey v. Cole, 130 Cal.App. 683, 20 P.(2d) 972.

[8, 9] During the last two sessions of the Legislature numerous measures were enacted for the purpose of lightening the burden upon property owners whose lands were subject to bond issues of various types. The members of the Legislature apparently were of the opinion, and we think we may take judicial notice of that fact, that the excessive bond issues which were made liens upon real property during recent years constituted such a burden upon the real property of the state that the owners thereof were unable to meet their obligations without serious property loss. Realizing this fact, many acts were passed at these sessions of the Legislature with the object and purpose of rescuing the overburdened property owner from his unfortunate predicament so far as it could legally be done. Undoubtedly the purpose of amending sections 62 and 63 of the Improvement Act of 1911 was along this same line, and by these amendments the Legislature intended that the 5 per cent. penalty which was imposed by these sections of the act should, in the interest of the heavily burdened landowner, be abolished, or at least greatly reduced, not only as to bonds that might be issued thereafter, but, if the amendments were to extend any relief to present conditions, to existing bond issues, in so far as the amendments provided for the remission of said penalty due the city. We think it was the clear intent of the Legislature to abolish, in so far as the city was given any right thereto, the penalty imposed by the act as originally enacted and provided for in said sections prior to their amendments. That it was within the power of the Legislature to abolish the city's right to any uncollected penalty, we think we have already shown by the authorities cited above. It follows, therefore, that the appellant herein was under no legal duty to advance to the city treasurer any portion of said penalty. As practically the only purpose of section 76b was to insure the collection of said penalty for the city, there was no legal duty resting upon appellant to comply with its provisions before being entitled to the entry of its foreclosure judgment. It was the duty of the respondent clerk to enter said judgment upon the same being filed in his office and without the delivery to him of the certificate of cancellation of the city treasurer as provided in said section 76b.

The judgment is reversed, with direction to the trial court to issue the writ of mandate as prayed for by the appellant.

4 Cal.2d 767

EARL RANCH, Limited, v. INDUSTRIAL ACCIDENT COMMISSION.

L. A. 15182.

Supreme Court of California.

Dec. 27, 1935.

1. Master and servant ⇐363

Under statute relieving employer whose pay roll for preceding calendar year had not exceeded $500 of necessity of giving notice of rejection of compensation provisions, farm laborer injured two months after acquisition of ranch by employer on April 1st, which had had no pay roll for agricultural laborers prior to that time, *held* not entitled to compensation, although neither party had rejected Compensation Act and pay roll had exceeded $500 during such 2-month period, since "calendar year" meant from January 1 to December 31 next, inclusive (Gen.Laws 1931, Act 4749, § 8; St.1927, p. 1681; St. 1931, p. 1962).

[Ed. Note.—For other definitions of "Calendar Year," see Words & Phrases.]

2. Master and servant ⇐348

Workmen's Compensation Act should receive liberal interpretation (Gen.Laws 1931, Act 4749).

3. Statutes ⇐205

Ambiguity or inconsistency in statutory provisions should be resolved, if possible, so as to carry out fundamental legislative purpose as gathered from whole of act.

4. Statutes ⇐190

Readily understandable term used in statute must be taken as expression of legislative intent, although Legislature may have used it without fullest understanding of possible consequences.

In Bank.

Application for writ of certiorari by the Earl Ranch, Limited, to review an award of the Industrial Accident Commission of the State of California awarding compensation to an employee.

Award annulled.

Prior opinion, 39 P.(2d) 463.

Fred W. Heatherly and Joe Orloff, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Fred W. Heath, of Los Angeles, for respondent Joe Anderson.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division Two. After further consideration, we are satisfied with the determination of the cause reached by said court, and we hereby adopt the following opinion of Mr. Justice Scott, pro tempore, as part of the opinion of this court:

[1] "Respondent Anderson was injured June 17, 1932, while working as farm laborer employed by petitioner. The latter had acquired the ranch property about April 1, 1932. An award was made to said employee for said injury, and petitioner seeks to have it annulled on the ground that the employer did not come within the terms of the Workmen's Compensation Act because its pay roll had been less than $500 for the preceding calendar year. It appears that it had no pay roll whatever embracing agricultural laborers until it took over the ranch on which Anderson worked. Between the time of acquisition of the property and the date of the accident—a period of about two months—petitioner's total pay roll exceeded by a substantial amount the sum of $500.

"The Workmen's Compensation Act (General Laws 1931, Act 4749, § 8), in defining 'employee,' excludes agricultural laborers. Chapter 834, St.1927, p. 1681, modifies the effect of such definition, and provides that both employer and employee shall be conclusively presumed to have accepted the compensation provisions of said Workmen's Compensation Act as amended, unless each takes affirmative action as therein prescribed rejecting its provisions. In 1931 (St.1931, c. 955, p. 1962), section 1 of said chapter 834 was amended so that this presumption would not be operative so as to require such notice of rejection, 'where the pay roll of such employer for the preceding calendar year has not exceeded five hundred dollars.' No notice of rejection was given in this case.

"We find no substantial support in the cases cited for respondent's contention that the term 'calendar year' should be con-

strued as synonymous with 'year,' and that such year could be calculated as the twelve months preceding the accident. The words 'calendar year' mean from January 1 to December 31 next, inclusive. Brown v. Anderson, 77 Cal. 236, 19 P. 487; Shaffner v. Lipinsky, 194 N.C. 1, 138 S.E. 418; Byrne v. Bearden, 27 Ga.App. 149, 107 S. E. 782. Since petitioner's pay roll for the calendar year preceding the accident was less than $500, it was excluded from the compensation provisions of the Workmen's Compensation Act, even though no notice of rejection was given."

[2-4] It is earnestly contended by respondent employee that this decision reaches an absurd result, granting a one-year period of exemption to certain farm owners, no matter how large and prosperous, where they have commenced business a short time before the accident; and we are urged to construe the statute so as to reach a result more reasonable, just, and in consonance with the legislative purpose in the enactment of the Workmen's Compensation Act. To do what respondent asks, however, would be to ignore the statute and not to construe it. It is true that the Workmen's Compensation Act should receive a liberal interpretation, and it is a familiar doctrine of statutory interpretation that where there is ambiguity or inconsistency in provisions of a statute, this should be resolved, if possible, in such manner as to carry out the fundamental legislative purpose as gathered from the whole of the act. But in the present case there is no ambiguity and no inconsistency in the provision to be construed. It may be, as respondent asserts, that the provision is contrary to the basic policy of the statute, but it still represents the law. In other words, the readily understandable term "calendar year" is what the Legislature used, and it must, under the circumstances, be taken as the expression of the legislative intent, even though the Legislature may have used it without the fullest understanding of the possible consequences. See Mulville v. San Diego, 183 Cal. 734, 739, 192 P. 702; Bagg v. Wickizer (Cal.App.) 50 P.(2d) 1047. It is both futile and dangerous for a court to tamper with unmistakable language of a statute in order to achieve some imagined and undisclosed legislative purpose.

The award is annulled.

5 Cal.2d 81

PUREFOY v. PACIFIC AUTOMOBILE INDEMNITY EXCHANGE.

L. A. 14041.

Supreme Court of California.

Dec. 31, 1935.

1. Insurance ⇐646(9)

Where liability insurer first learned of automobile accident three and one-half months thereafter through letter from injured person's attorney requesting address of insured, whose first communication to insurer was made fifteen months after accident, prejudice to insurer from delayed inquiry must be presumed, precluding injured person from recovering against insurer where policy required "immediate notice" of accident (St. 1919, p. 776; Civ.Code, § 2633a).

[Ed. Note.—For other definitions of "Immediate Notice," see Words & Phrases.]

2. Insurance ⇐558(1)

Liability insurer's conduct in endeavoring to locate insured when first learning of accident over three months thereafter *held* not waiver of insured's subsequent continued failure to give notice of accident pursuant to policy, precluding injured person from recovering against insurer.

3. Insurance ⇐558(1)

Where liability insurer first learned of accident three and one-half months thereafter, retention of premium subsequently received *held* not waiver of right to rely, as against injured person, on breach of condition of policy requiring immediate notice of accident, where insurer did not know insured's whereabouts until almost eleven months after receiving premium, and where neither insured nor injured person was misled.

4. Insurance ⇐639

Plaintiff relying on waiver of breach of conditions in insurance policy must allege such waiver, and evidence thereof is inadmissible under allegations of performance of conditions.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by J. W. Purefoy against the Pacific Automobile Indemnity Exchange, a reciprocal or interinsurance exchange. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 46 P.(2d) 143.

Bordwell, Mathews & Wadsworth, of Los Angeles, for appellant.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

Crosby & Crosby, of Oakland, Elliott, Atkinson & Sitton, of Sacramento, Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Levinsky & Jones, of Stockton, Mannon & Brazier, of Ukiah, Joseph M. Raines, of Fairfield, Rea, Free & Jacka, of San Jose, Edmund Scott, of Redwood City, Jesse H. Steinhart, John J. Goldberg, and Bronson, Bronson & Slaven, all of San Francisco, Harry D. Parker, Raymond G. Stanbury, White McGee, Jr., Vernon W. Hunt, Mathes & Sheppard, Robert A. Cushman, Robert E. Ford, C. F. Jorz, and Albert J. Morrissey, all of Los Angeles, Cooley, Crowley & Supple and Redman, Alexander & Bacon, all of San Francisco, Brown, Ledwich & Rosson and Donahue, Hynes & Hamlin, all of Oakland, Gerald M. Desmond, of Sacramento, Frank Campbell, of San Jose, Wyckoff, Gardner & Parker, of Watsonville, Conley, Conley & Conley, of Fresno, Neumiller & Ditz, of Stockton, J. Hampton Hoge and Myrick & Deering and Scott, all of San Francisco (A. Dal Thomson, of San Francisco, of counsel), amici curiæ.

SEAWELL, Justice.

Plaintiff, J. W. Purefoy recovered judgment against W. S. Austin and Jack Austin, his minor son, in the amount of $2,800, for personal injuries sustained by plaintiff as a result of the negligent operation by Jack Austin of an automobile owned by W. S. Austin. Thereafter plaintiff commenced this action to recover the amount of said judgment from defendant Pacific Automobile Indemnity Exchange, which had issued a policy of liability insurance to W. S. Austin. The court below rendered judgment for defendant, based on findings that the insured, W. S. Austin, had violated conditions of the policy of insurance requiring the insured to give immediate notice of any accident.

The defendant Pacific Automobile Indemnity Exchange is a reciprocal or interinsurance exchange, operating under the provisions of Statutes of 1921, c. 834, p. 1599. The Individual Underwriting Corporation is named as its attorney in fact to receive notices required to be given by the policies issued to subscribers to the exchange. The provisions in the policy requiring the insured to give notice of any accident are as follows:

"A. The insured shall give the Individual Underwriting Corporation herein called the Attorney, *immediate* written notice of any accident, claim, loss or suit hereunder with fullest information obtainable, especially the names and addresses of all witnesses to the accident or other occurrence, under which liability arises or might arise, and shall *immediately* deliver to the Attorney every summons or any other papers served on him on behalf of third persons. * * * [The words "immediate" and "immediately," italicized above, appear in darker type in the policy than the balance of the paragraph.]

"B. In addition to the notice provided for in Section A, the assured shall furnish an affidavit containing the information desired by the Attorney, including the conditions surrounding the happening of any accident, the date and cause of any accident or loss, a description of the articles damaged or lost. * * *

"Each and every duty imposed by sections 'A' and/or 'B' hereof upon the assured is a condition subsequent and immediately upon a failure or refusal to perform any one or more of said conditions this policy and the liability of the Exchange, if any, thereunder shall automatically terminate."

The accident which gave rise to the present action occurred on December 16, 1929. W. S. Austin had made application for the insurance on December 15, 1929. The policy as issued was dated December 17, 1929, but it was expressly made effective from December 15, 1929, the date of the application. In addition to the paragraphs in the body of the policy, quoted above, the cover contained this notation, marked *"IMPORTANT,"* in bold-faced type: "In case of an accident, however slight, do not fail to immediately notify the office through which you were insured or the nearest branch of the Individual Underwriting Corporation." A list of addresses of offices follows, headed by the Los Angeles office. The same notation appeared at the top of two copies of a form for reporting accidents which was inclosed with the policy for delivery to Austin. Austin had applied for this insurance to Benjamin C. Charles, a Los Angeles insurance broker, and the policy was sent to Charles when issued for delivery to Austin. As it was

not issued until December 16, 1929, it must have been delivered to Austin after the accident of December 16, 1929. Neither W. S. Austin nor Jack Austin gave immediate notice of the accident to Mr. Charles, the Individual Underwriting Corporation, or the exchange. On April 22, 1930, the corporation received through Mr. Charles a payment of the balance of the premium due from Austin. It does not appear whether Austin made this payment to Mr. Charles before or after the accident. Plaintiff relies on the retention of this premium as a waiver of any rights the insurer otherwise would have by reason of the insured's failure to give timely notice.

The insurer first learned of the accident three and a half months after its occurrence, when a letter dated March 31, 1930, and sent to Mr. Charles' office by plaintiff's attorney, was forwarded to the insurer. Said letter is as follows:

"We are informed by Mr. W. S. Austin that you are the insurance carriers under an insurance policy insuring his car, license No. 4-T-23-41, make model, Overland.

"We have a client that has a claim against Mr. Austin, and we would appreciate it very much if you could give us his present address as we desire to discuss the settlement of the claim with him."

The plaintiff had already commenced action against the Austins by complaint filed on March 15, 1930, but the letter contained no information of that fact. An employee of the Individual Underwriting Corporation, after ascertaining from Mr. Charles that he had no report of the accident, telephoned to plaintiff's attorney, and in his absence learned from some one in his office the date and place of the accident. On April 7, 1930, the corporation wrote a letter to Austin, requesting full details, and inclosing a report blank. This letter was addressed to him at "155 S. Pacific Glendale, Calif.," the address given by him in his application for insurance. It was returned unclaimed, and remailed to Austin at "155 So. Pacific, Pasadena" (instead of Los Angeles), and again returned as unclaimed. Thereafter neither plaintiff nor the insurer knew the whereabouts of Austin, and the plaintiff was unable to obtain service of the summons in the action commenced by him until March 18, 1931, a year and three months after the accident. In the course of the trial in the instant action, statements were made as to Austin having been out of the state. He did not testify in the instant action.

The Individual Underwriting Corporation first learned of the suit on September 20, 1930, when plaintiff's attorney telephoned to it. It informed him that it refused to accept the defense of the suit because Mr. Austin had never made a report to it. The corporation also wrote to the broker, Mr. Charles, on September 22, 1930, to inform Austin of its attitude should he take up the matter with said broker.

On March 19, 1931, the day following the service upon him of plaintiff's complaint in the action for personal injuries, Austin wrote to the broker, Mr. Charles, as follows:

"Enclosed find summons served on me 5 pm Wednesday Mar. 18-1931, relating to accident reported to you in December 1929.

"You will have a file of witness names and Addresses.

"W. S. Austin, 3003 Foothill Blv'd. Pasadena, Calif.

"Please advise procedure.

"W. S. A."

This letter, received a year and three months after the accident, was the first communication from the insured. Mr. Charles informed the Individual Underwriting Corporation of its contents, and on March 21, 1931, Mr. Charles wrote to Austin that as he had never made a report of the accident the insurer could not accept the defense of the suit. Austin was advised to employ a lawyer to handle the case. On April 10, 1931, the insurer again reiterated its stand in a conversation with plaintiff's attorney. The insurer did not defend the action; the Austins permitted their defaults to be entered, and plaintiff recovered the judgment for $2,800 against W. S. Austin and Jack Austin, upon which he brought the instant action. Austin's letter of March 19, 1931, contains the statement, "You will have a file of witness names and addresses." But Mr. Charles and officials of the insurer and its attorney in fact testified unequivocally that no report of the accident had ever been made.

It is undoubtedly true that plaintiff's attorney gave the insurer full opportunity to defend on Austin's behalf the action commenced in March, 1930. As late as April 10, 1931, said attorney stated to the Individual Underwriting Corporation that he did not want to take a default without

giving the insurer an opportunity to defend. It may also be that Austin's statement in his letter, "Please advise procedure," indicated that he would co-operate with the insurer from then on. But the insurer when first informed on September 20, 1930, that suit had been brought and at all times thereafter consistently took the position that by reason of Austin's failure to give it prompt notice, which would have afforded it opportunity to make a prompt investigation, it was under no duty to either defend the suit on behalf of the Austins, or thereafter to pay plaintiff any judgment recovered by him.

The provisions of Statutes 1919, page 776, require policies of liability insurance to contain a provision giving to the injured person who has secured judgment against the insured the right to bring an action against the insurance company *"on the policy and subject to its terms and limitations."* Stipulations for "immediate notice" have been held to require notice which is prompt and reasonable, having due regard to the circumstances existing. See section 2633a, Civ.Code; extensive annotation, 76 A.L.R. 23, particularly at page 53; Coolidge v. Standard Acc. Ins. Co., 114 Cal.App. 716, 300 P. 885; National Paper Box Co. v. Ætna Life Ins. Co., 170 Mo. App. 361, 156 S.W. 740, 741; Barclay v. London Guar. & Acc. Co., 46 Colo. 558, 105 P. 865; Oakland Motor Co. v. American Fid. Co., 190 Mich. 74, 155 N.W. 729; New Jersey Fid., etc., Co. v. Love (C.C.A.) 43 F.(2d) 82.

[1] Appellant contends that in an action brought by the injured person against the insurance company, before it may rely on a breach of condition to avoid liability it must appear that it has been prejudiced by the breach. Respondent contends that our statement in Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P.(2d) 999, 85 A.L.R. 13, to the effect that the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby, was unnecessary to the decision, and should be disapproved of in the instant case, as it is contrary to the great weight of authority in other jurisdictions. Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443, note page 1446, see particularly page 1499; Clements v. Preferred Acc. Ins. Co. (C.C.A.) 41 F.(2d) 470, 76 A.L.R. 17, note page 23, see particularly page 201; note, 85 A.L.R. 20 particularly page 70; St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co. (C.C.A.) 40 F.(2d) 344, certiorari denied 282 U.S. 882, 51 S.Ct. 86, 75 L.Ed. 778; Jefferson Realty Co. v. Employers' Liability Assur. Corp., 149 Ky. 741, 149 S.W. 1011. Respondent contends that as liability insurance is not compulsory, but voluntary, effect must be given to express conditions between the parties to the contract of insurance, as in the case of other types of contracts, without a showing of prejudice.

We are not disposed at this time to enter upon a further consideration of the conflicting decisions as to whether prejudice must be shown, for we are of the view in the instant case, as we were in the Hynding Case, supra, that prejudice sufficiently appeared, and the court below so found. The insured did not communicate with the insurer or its agent or broker, Mr. Charles, until a year and three months after the accident. The letter of March 31, 1930, more than three months after the accident, was not written by plaintiff's attorney for the purpose of informing the insurer of the facts, but asked for the address of the insured. Thereafter plaintiff did not communicate with the insurer until September 20, 1930, nine months after the accident. There are decisions holding that the requirement for notice may be satisfied by notice given by the injured person. See annotation, 76 A.L.R. 38, citing cases. But in the instant case, the notice was not given promptly after the accident by the injured person. Notice given three and a half months after the accident, especially when it is considered that the notice given at that date was not from the insured, but from the injured person, who was an adverse party, was not reasonably prompt notice, and did not constitute a compliance with the policy. Coolidge v. Standard Acc. Ins. Co., supra; Los Angeles Athletic Club v. United States Fidelity & Guar. Co., 41 Cal. App. 439, 183 P. 174; Aronson v. Frankfort, etc., Ins. Co., 9 Cal.App. 473, 99 P. 537. The information communicated to the insurer three and a half months after the accident otherwise failed to comply with the policy. It contained the bare statement that a named policyholder had been in an accident, without stating even the time and place of the accident. It did not state the names and addresses of all witnesses to the accident, nor the "conditions sur-

rounding the happening" of the accident, as required by the policy.

The insurer was deprived of an opportunity to make a prompt investigation while the facts were fresh in the minds of the parties and witnesses, and before physical marks and effects of the accident had been obliterated. As to certain breaches of condition, it may more readily be shown whether prejudice had resulted therefrom. But respondent argues with convincing force herein that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations.

In Hynding v. Home Accident Ins. Co., supra, it was held that the insurance company was clearly prejudiced by the failure of the assured to appear at the trial of the damage action instituted by the injured person. The insured in his report to the company had indicated that a defense existed, and it was to be expected that his testimony would bear this out. Nevertheless the jury may have disbelieved such testimony and accepted the plaintiff's version, in which event the insurance company would not have been ultimately prejudiced through his failure to be present at the trial. As a practical matter, it would be impossible for the insurer to show that had the assured testified, the verdict would have been in his favor. Our opinion did not hold the insurance company to such an impractical requirement. A similar difficulty of proof exists where prompt investigation has been prevented. The insurer is entitled to rely on a substantial breach of so material a condition of its policy, unless it can be deemed to have waived compliance with the condition.

We disposed of the contention advanced in the Hynding Case, supra, to wit, that to permit the insurer to rely on the insured's breach of co-operation clauses to defeat liability would open an avenue to temptation to insurers through collusive action with judgment proof clients, by pointing out that a contrary rule would open an equal possibility of collusion between the insured and the injured party to defeat the rights of the insurance company, and we further stated that in view of the provisions of our statute giving the injured person a right to bring action "on the policy and subject to its terms and limitations," neither possibility was properly the subject of consideration. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 751, 7 P.(2d) 999, 85 A.L.R. 13.

In the Hynding Case, supra, we disapproved language in Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 485, 297 P. 110, 298 P. 57, which seemed to imply that neither the insurer nor the insured by any voluntary act after happening of the accident could defeat the right of the injured person to sue the insurance company, even though the act of the insured was a breach of a condition in the policy. In fairness to the appellate court it should be said that the criticized statement as quoted in the Hynding Case is taken from the report of the Bachman Case as it appeared in 64 Cal. App. Dec. 971, which, it seems probable, contained a typographical or printer's error. In the Hynding Case, 214 Cal. 743, 748, 7 P.(2d) 999, 1000, 85 A.L.R. 13, we quote the language in the Bachman Case of which we disapprove as follows: "'We are of the opinion that after the happening of an accident coming within the coverage provisions of a policy of insurance, such as we are considering, neither the insurer nor the insured can, by any voluntary act, defeat the statutory right given to the injured person to bring an action on the policy after judgment recovered against the insured without some act or omission on the part of the *injured (party)* which will relieve the insurer from liability.'" (Italics supplied.) The word "party" appearing above in parentheses is added by us to the statement in the Bachman Case as it appears in 64 Cal.App. Dec. 971, 983. It seems likely that when our opinion in the Hynding Case was filed, the decision in the Bachman Case had not yet been published in final form in 112 Cal.App. 465. As the Bachman Case is reported in 112 Cal.App. 465, the word "insured" appears in place of "injured" or "injured (party)," as italicized above. With the use of the word "insured," the statement of the appellate court would seem to recognize that acts of the insured which con-

stitute a breach of conditions of the policy may relieve the insurer from liability. This construction of the opinion is further indicated by the remarks of the appellate court in denying a petition for rehearing in the Bachman Case.

Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 P. 512, holds that the parties may not insert in contracts of insurance provisions which contravene Statutes 1919, page 776. It does not hold that the right of action given the injured person by said statute is not subject to lawful conditions of the policy.

[2] Appellant contends that by retaining the premium after notice of the accident, the insurer waived the delay and insufficiency of the notice. On April 22, 1930, the insurer received from the broker, Mr. Charles, the whole or a portion of the premium paid by Mr. Austin to said broker. It does not appear whether Austin paid this amount before or after the accident. The policy provided that "upon a failure or refusal to perform any one or more of said conditions this policy and the liability of the Exchange, if any, thereunder shall automatically terminate." At the time when the insurer received this premium from Mr. Austin it was still trying to locate Austin. The letter addressed to him at 155 S. Pacific, Pasadena, had not yet been returned unclaimed. The act of the insurer in endeavoring to locate Austin when it learned of the accident in March, 1930, did not constitute a waiver of Austin's continued failure thereafter to give notice. The insurer may have been willing to waive the antecedent delay had Austin received its letter and promptly given it full information. But Austin made no communication until March 19, 1931, and plaintiff's attorney did not again communicate with the insurer until September 20, 1930.

[3] The policy of liability insurance did not insure Austin only against liability on account of this particular accident, but also against liability for other accidents during the life of the policy, which was one year from December 15, 1929. We are of the view that by retaining the premium the insurer may have waived the right to declare the policy forfeited, and thereby have protected Austin as to other accidents during the life of the policy, but that it did not waive the right to rely on the breach of condition to defeat liability as to this particular accident. Until March 19, 1931, the insurer did not know the whereabouts of Austin, and could not directly inform him of its intention to rely on the breach of condition. Between April 22, 1930, and March 19, 1931, the insurer's only contact with plaintiff's attorney was on September 20, 1930, and at that date and consistently thereafter it placed its denial of liability on the ground of the failure of notice. Neither the insured nor plaintiff was shown to have been misled by any act of the insurer to believe that it did not intend to rely on the breach of condition, nor to have altered his position in reliance on such a belief. McDanels v. General Ins. Co., 1 Cal.App.(2d) 454, 36 P.(2d) 829.

[4] Furthermore, it is the rule in this state that where the plaintiff relies on waiver of a breach of conditions in a policy, he must allege said waiver, and evidence of waiver is not admissible under allegations of performance of conditions. Goorberg v. Western Assurance Co., 150 Cal. 510, 89 P. 130, 10 L.R.A.(N.S.) 876, 119 Am. St.Rep. 246, 11 Ann.Cas. 801; Aronson v. Frankfort, etc., Ins. Co., 9 Cal.App. 473, 99 P. 537; Schmid v. Automobile Underwriters, 215 Iowa, 170, 244 N.W. 729, 85 A.L.R. 4; Barclay v. London Guarantee & Acc. Co., 46 Colo. 558, 105 P. 865; note, 76 A.L.R. 131. In the instant case plaintiff alleged on information and belief that Austin gave immediate notice of the accident with fullest information, and otherwise complied with conditions of the policy exactly. He knew that the insurer denied liability on account of the long delay in giving notice, and intended to rely on the breach of condition, yet he made no effort either originally by amendment to allege a waiver. We conclude that plaintiff has not established a waiver of the condition as to notice.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.

WASTE, Chief Justice.

I concur in the judgment because the court found that the insurer was prejudiced by the delay in receiving notice from the insured of the happening of the accident.

4 Cal.2d 770

LACY v. GREER-ROBBINS CO.

L. A. 14112.

Supreme Court of California.

Dec. 30, 1935.

1. Sales ⇐397

In action for rescission of sale of automobile for breach of warranty, evidence supported findings that automobile was defective and unsuitable for purpose for which it was intended.

2. Sales ⇐273(1)

Under Civil Code article relating to warranties of sales, before amendment of 1931, sale of new automobile which was not manufactured by seller and which buyer purchased after looking at it on floor of salesroom, did not imply warranty that automobile would be suitable to serve ordinary purposes for which it was made and sold (Civ.Code, § 1764).

3. Sales ⇐273(1)

Warranty was not implied in sale of new automobile by dealer on ground that automobile was inaccessible to buyer's examination as to mechanical construction, where buyer had opportunity to examine automobile if he so desired (Civ.Code, §§ 1764, 1767, 1771).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by P. W. Lacy against the Greer-Robbins Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Prior opinion, 41 P.(2d) 372.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Bradner & Weil, of Los Angeles, for respondent.

PER CURIAM.

This case was transferred to this court from the District Court of Appeal of the Fourth Appellate District, after decision by that court, for the purpose of giving further consideration to the question of an implied warranty in the sale by a dealer of an automobile which, after such sale, proved to be defective and unfit for use. We have devoted some time to the study of the sections of the Civil Code relating to the subject of warranties in the sale of personal property in effect at the date of said sale and of the decisions of this state construing these sections of the Code, and are constrained to agree with the decision of the District Court of Appeal in holding that in the sale of said automobile there was no implied warranty as to its fitness to perform either the special purpose for which it was purchased or the general purposes for which machines of that character are used. We therefore adopt the opinion of that court, written by Mr. Presiding Justice Barnard, and make it the opinion of this court. It is as follows:

On February 9, 1931, the plaintiff agreed to purchase from the defendant under a conditional sales contract a new Chrysler automobile for $2,282.67, payable in installments. Within a day or two he discovered that the machine did not operate properly and took the same to the defendant's place of business to have the defects corrected. The defendant's employees were unable to discover what caused the trouble, and told him to drive the car "another thousand miles," and that the defects might disappear when the car was broken in. The defective condition of the car continued, and the plaintiff had it in the defendant's garage some twenty times, sometimes leaving it there several days at a time. The defendant's employees were never able to locate the cause of the trouble, and finally, in August, 1931, the plaintiff was told that nothing more would be done for him. Having by that time paid $890 on account of the purchase price, he gave notice of rescission, tendered back the car, and demanded the return of the amount paid. The defendant refused to comply with the demand for rescission, but took possession of the car when the plaintiff refused to make the next payment. The plaintiff brought this action to recover the amount paid and recovered judgment for $380, the court finding that the value of the use of the car in the meantime was $510. From the judgment entered the defendant has taken this appeal.

[1] The court found that this automobile was defective and not suitable for the purpose for which it was intended. Although not without conflict, the evidence supports these findings. The main question here presented is whether the evidence supports certain other findings to the effect that the appellant had warranted to the respondent that the automobile

would function properly, that it was sound, merchantable, and fit for the purposes for which it was intended, and that the appellant had no knowledge of any defects in the car. The court further found that the respondent relied upon each and all of these facts and that "each of said warranties was, and all of them were untrue."

The conditional sales contract was not introduced in evidence and is not before us. The respondent, conceding that there were no express warranties and that no statements were made to him, relies entirely upon the contention that there was an implied warranty that this automobile would be suitable to serve the ordinary purposes for which it was made and sold. It was a new car which was not manufactured by the appellant, and the respondent purchased the same after looking at it on the floor of the salesroom.

[2] In Silverthorne v. Simon, 59 Cal. App. 494, 211 P. 26, 28, the court said: "The contract contains nothing in the nature of a warranty, and the mere conditional agreement to sell does not imply a warranty. Civ. Code, § 1764." In Wardlow v. Sanderson, 190 Cal. 417, 213 P. 35, 36, it is said: "There had been no breach of any warranty of sale on the part of the vendor. In the article of the Civil Code relating to warranties of sales, it is declared that 'Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.' Civ. Code, § 1764. That article does not provide for any warranty applicable to the facts of this case."

The provisions of the Civil Code relating to such warranties were amended in 1931 (St. 1931, p. 2234), but we are here concerned with the law as it existed prior thereto. While certain other cases are relied upon by the respondent, these cases involved either express warranties or facts which brought them within the exceptions provided in this article of the Civil Code before these amendments became effective.

[3] It is argued that the facts of this case bring it within the exceptions formerly provided by sections 1767 and 1771 of the Civil Code. While the court found that at the time the respondent agreed to purchase this automobile he relied upon the advice and judgment of the appellant, that the appellant well knew this fact, that at that time the automobile was "inaccessible to the examination of the plaintiff as to its mechanical construction," that the respondent had no knowledge or means of knowledge of such matters, that the appellant had full knowledge of the actual condition of the automobile, and that the appellant failed to inform the respondent concerning said condition, the record is entirely devoid of evidence to sustain any of these findings. There is no evidence that the appellant made any statements or gave any advice to the respondent, and none that the appellant knew of the defects which later developed or had knowledge of any fact which would destroy or affect the buyer's inducement to buy. Nor do we think this automobile was inaccessible to the examination of the buyer, within the meaning of section 1771 as it then read. The car was there, and was looked over to some extent by the buyer, and it has been frequently held that this section has no application where an opportunity to examine the merchandise exists, but where a complete examination is not made because the same would involve some expense and inconvenience. The respondent had an opportunity to examine the car if he so desired, and it fully appears that the appellant had no knowledge of the defects which later appeared.

There being no evidence in the record to bring this case within any of the exceptions then provided for in the article of the Civil Code referred to, it follows that a warranty cannot be implied, and that these essential findings are without support in the evidence.

The judgment appealed from is reversed.

ZELLERBACH PAPER CO. v. VIRDEN PACKING CO.*

Civ. 9606.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1935.

Hearing Denied by Supreme Court Feb. 13, 1936.

1. Corporations ⇐1

Where corporation was not one-man corporation nor under one-man control, in view of nomination of directors through nominating committee, alter ego doctrine *held* inapplicable, as regards corporation's liability on alleged guaranty bearing corporation's name and seal placed thereon by president.

2. Corporations ⇐432(4)

Corporate seal on alleged guaranty *held* merely presumptive evidence of president's authority to execute guaranty in corporation's name.

3. Corporations ⇐412

Resolution authorizing president to make loans to former subsidiary when he saw fit, not to exceed $100,000 at one time, *held* not to authorize president to bind parent corporation on alleged guaranty of subsidiary's credit without limitation of time or amount.

4. Corporations ⇐432(12)

Evidence that president aided former subsidiary with parent corporation's funds by loans and trade acceptances involving no genuine mercantile transactions to extent of about $1,000,000 over period of years *held* insufficient to show ostensible authority by president to bind corporation on alleged continuing guaranty of subsidiary's credit.

5. Corporations ⇐432(6, 9)

President's actual authority or lack thereof to execute guaranty of credit may be shown by corporation's by-laws or minutes.

6. Guaranty ⇐27

Guaranties, such as guaranties of credit, are subject, like other contracts, to rule of interpretation whereby primary object is to ascertain and effectuate parties' intention (Civ.Code, §§ 1636, 1648).

7. Guaranty ⇐27

Guaranties, such as guaranties of credit, being usually drawn by laymen, should not be construed with technical care.

8. Guaranty ⇐38(2)

Instrument executed by president, stating that corporation thereby guaranteed payment of present indebtedness of former subsidiary and additional credit extended by guarantee, and agreed to execute suitable guaranty evidencing such agreement, *held* not intended to constitute continuing guaranty of unlimited credit, in view of parties' conduct, including sending of letters by guarantee to president but not to corporation nor its directors, seeking to have president personally endeavor to have subsidiary meet its obligations, and making no reference to guaranty.

9. Corporations ⇐425(4)

Corporation, which never held out president as authorized, to knowledge of guarantee, to execute contracts such as guaranty of credit, and which did no act with intention of influencing guarantee, *held* not estopped, as against guarantee, to question president's authority to execute alleged guaranty.

10. Guaranty ⇐48

Creditor-guarantee *held* entitled to pursue debtor before looking to guarantor of debtor's credit.

11. Appeal and error ⇐1050(1)

In action against alleged guarantor of debtor's credit, error, if any, in admitting evidence that creditor-guarantee prepared bankruptcy claim against debtor and was one of petitioners in bankruptcy proceeding, on question whether creditor regarded instrument as guaranty, *held* harmless, where other evidence showed that instrument was not so regarded.

12. Appeal and error ⇐1050(1)

In action against alleged guarantor of debtor's credit, error, if any, in admitting evidence that creditor-guarantee's credit manager served on a creditor's committee of debtor without disclosing existence of alleged guaranty *held* harmless, where credit manager was appointed by guarantor's president after institution of bankruptcy proceeding against debtor, with view to working out debtor's salvation.

13. Appeal and error ⇐1048(6)

In action against alleged corporate guarantor, which proved directors' lack of knowledge of execution of alleged guaranty by president, error, if any, in excluding cross-examination to show that directors knew little or nothing of president's activities generally, *held* harmless, where evidence disproved ostensible as well as actual agency, and everything that might have been shown by such cross-examination was fully developed.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the Zellerbach Paper Company against the Virden Packing Compa-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 54 P.(2d) 18.

ny. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissenting.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellant.

James, Brann & Rowe, of San Francisco, for respondent.

McNUTT, Justice pro tem.

Zellerbach Paper Company sued Virden Packing Company as upon a continuing guaranty of credit extended by the former to Pioneer Fruit Company for goods sold by Zellerbach to it. Judgment went for defendant, and plaintiff appeals. Each of said companies is a corporation. The Virden Company and the Pioneer Company had a common president in Charles E. Virden, who was as well general manager of the packing company, and for many years the packing company owned the capital stock of the fruit company, after which Mr. Virden became the owner thereof. The packing company and the fruit company were customers of plaintiff; the Pioneer had been purchasing large quantities of wrapping materials without uniformity in point of quantity or price of the successive individual invoices.

The complaint alleges that on May 26, 1927, the Pioneer was indebted to the Zellerbach Company in the sum of $16,664.39 for a balance on an open book account for merchandise sold the fruit company; that said account was past due; that Pioneer desired further credit from the paper company, and in consideration thereof the Virden Company agreed to guarantee payment of the fruit company's then existing indebtedness, and such additional credit as Zellerbach Company might extend to the fruit company; that the guaranty was executed and that the Virden Company had never revoked it; that relying upon the guaranty, the paper company extended further credit to the fruit company, selling it merchandise up to more than $85,000; that prior to suit, the original indebtedness had been paid by the purchaser fruit company as had sums upon the total amount of purchases, so that at the commencement of the action there was unpaid $21,000 plus dollars, together with interest, or a total of $25,270.85; that demand had been made by the paper company upon the Virden Company for this sum, followed by the latter's refusal of payment.

The answer denied the allegations of the complaint and also denied that C. E. Virden, president of the packing company, had authority to execute the alleged guaranty; that the so-called "guaranty" was not such, but was rather an offer of guaranty; and that, if it were a guaranty, it was not a continuing one, but merely that of the original unpaid balance of $16,000.

Mr. Anderson, credit manager of the paper company, says that in May, 1927, he called Mr. Virden's attention to the fruit company's balance to the paper company, and suggested that the packing company guarantee the account; that at first he demurred, but finally agreed to give appellant the desired guaranty when the latter, through Anderson, informed him that otherwise it would furnish the fruit company with no more wrapping paper. Though Mr. Anderson's recollection was confused, the evidence shows that he prepared an installment note for $16,825.08, providing for an initial payment on June 18, 1927, intermediate payments, and the final payment August 18, 1927, and sent the same to the fruit company to which was attached the following memorandum (instrument in suit): "May 26th, 1927. Zellerbach Paper Company, San Francisco, California. Gentlemen: In consideration of our interest in the Pioneer Fruit Company and your extension of additional credit to them and your forbearance ~~to sue~~ on their present indebtedness to you, we hereby guarantee the payment of said indebtedness and the additional credit extended by you, and agree to execute a suitable form of guaranty evidencing this agreement. Yours very truly." The note signed by Pioneer and indorsed by the packing company, through its president, Charles E. Virden, was delivered to the paper company minus the attached memorandum, and, in consequence, under date of June 3d, the paper company, through Anderson, wrote the fruit company, "Attention Mr. J. H. Mann," the following letter: "Gentlemen: We acknowledge receipt of and thank you for your June 2nd letter enclosing note $16,825.08 which bears the endorsement

Chas.

of Virden Packing Company, ~~Charles~~ E. Virden, President. At the time we offered to accept this note we forwarded to you for signature of the Virden Packing Company a memorandum which they were to sign setting forth their interest in endorsing the note of the Pioneer Fruit Company. Will you please have this signed mem-

orandum returned to us for our files." Virden signed the name of respondent by himself as president to the instrument above set forth, placed the corporate seal thereon, and transmitted same to the paper company. The complaint herein was filed June 6, 1930, and it is for goods sold on credit to the fruit company during 1929 and 1930. The trial court found that the transactions in suit were not covered by the so-called "guaranty" of May 26, 1927.

Appellant contends that the instrument is a continuing guarantee, always in force because unrevoked; that it, prima facie, bound the respondent because executed by its president, and was impressed with a corporate seal; that the evidence shows actual *and* ostensible authority in Mr. Virden to execute said contract; that the trial court erred prejudicially in ruling upon certain proffered evidence. Scrutiny of the record impels the conclusion that the judgment should be affirmed, and that some of the propositions advanced are opposed to the evidence.

[1] The stock distribution of respondent shows that it was not a one-man corporation and that, hence, the alter ego doctrine is inapplicable; further, that the mechanics of nominating directors, under the amended by-laws by a nominating committee, was neither calculated nor employed to set up a one-man control through the medium of what is sometimes called a biddable board of directors. At a meeting held for that purpose the by-laws of the packing company were amended December 5, 1919 (Rep. Trans., p. 394), so that a nominating committee was created to report to the annual meeting of the stockholders nominees for the office of director. In the preparation of such list the committee was to select such nominees as, in their judgment, will be for the best interests of this corporation and its stockholders. "Nothing herein contained shall be construed as preventing any stockholder from voting his stock in this Company for any stockholder he may desire elected to serve as a director." The deduction that this committee was in any manner hindered in the free exercise of its own judgment, either through the use by Mr. Virden of his own stock or through proxies, is unwarranted.

At one place in the brief appellant suggests "that there never was a clearer case of ostensible authority proved, but we further say that not only was there ostensible authority but that there was actual authority" to execute the instrument. At another place: "If there was no express authority for Mr. Virden to make the loans which he made and to guarantee the indebtedness of Pioneer Company, certainly there was actual *and* ostensible authority in view of the fact that Mr. Virden over a period of some twelve years was permitted to handle financial transactions between the two companies (between Pioneer Fruit Company and Virden Packing Company) involving over a million dollars, with which transactions the directors apparently seem not to be concerned." As authority for the unwarranted deduction of ostensible agency in the president of respondent, appellant relies upon Mahoney Mining Company v. Anglo-Californian Bank, 104 U.S. 192, at page 194, 26 L.Ed. 707, at page 708, quoting as follows: "And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between *the parties themselves;* by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation." (Our italics.) Citing to the same effect Betts v. Southern Cal., etc., Exchange, 144 Cal. 402, at page 407, 77 P. 993, and Stevens v. Selma Fruit Company, 18 Cal.App. 242, at page 251, 123 P. 212.

The Mahoney Case, supra, presents no analogy to the facts at bar. Therein a mining company had for years carried its account with its treasurer, the Anglo Bank, making deposits therein, which were paid out on checks signed by the president and secretary of the mining company, the bank meanwhile allowing overdrafts on like checks. Such overdrafts with interest amounted, on June 21, 1877, to some $6,000. In the morning of said day, in an action pending in the district court before the city and county of San Francisco in which the stockholders of the mining company were plaintiffs and the mining company and its board of directors were directors, looking to the re-

moval of the directors from office, the decision was announced ousting them. The decision was not filed until June 22. On the afternoon of the 21st the board so ousted, on learning from the president of the overdraft at the bank, adopted a resolution authorizing the president and secretary to execute a note on behalf of the company running to the bank to cover the overdraft. The board, when so acting, had no notice of the decision. The suit was to recover the amount of the overdraft. Naturally in this inter partes suit the holding above set out was made because the bank was right in indulging the assumption of the authority which the officers of the mining company ostensibly had by reason of the course of conduct involved. The Betts and the Stevens Cases involve kindred situations, while at bar the appellant, paper company, had never heard, until after the execution of the instrument in suit, of any of President Virden's unwarranted activities (if any), and counsel below so stipulated. Rep.Trans., pp. 431 and 498.

[2-4] The presence of the corporate seal is merely presumptive evidence of authority in Virden. Under the by-laws the president did not have authority to execute the document, hence there was no actual authority. Under the evidence there was no ostensible authority. Appellant argues, however, that the president had actual authority, and would seem to base the argument upon the proposition that, prior to the execution of the instrument, the board of directors had passed a resolution authorizing the president, C. E. Virden, to make loans and advances to the Pioneer Fruit Company as and when he might see fit, not, however, to exceed a hundred thousand dollars at any one time. We do not feel, however, that such specific authority was intended to or that it did authorize the president to guaranty the credit of the Pioneer Fruit Company without limitation as to time or as to amount. Further, appellant argues that because the president of the packing company had aided the Pioneer Company with his corporation's funds by loans and by trade acceptance up to more or less a million dollars, that the board must be presumed to have had knowledge of Virden's acts and by a process of indulgence authorized them. This view is not tenable because, notwithstanding the board ratified acts of Virden in overloaning company funds to the Pioneer, it did not forgive any debts but rather took secured notes from Pioneer to cover the amount. Rep. Trans., p. 444 et seq.

No merchandise was ever sold by the Virden Company to the fruit company, and hence when the Virden Company drew trade acceptances which were accepted by the Pioneer and discounted on its own indorsement by the packing company genuine mercantile transactions were not involved but none of these activities was known to the appellant when this so-called "guaranty" was executed. Furthermore, this method of financing was authorized by resolution of the packing company. Reduced to its lowest terms, appellant's argument seems to be that, if a president ever exceeds the authority which is conferred upon him in respect to a particular loan and the principal ratifies it, and by resolution directs him never to do it again, that actual authority is conferred upon him to repeat the act, because the board of directors did not discharge him; all in the face, however, in the complete ignorance in the third party of the internal relations and workings of the corporation involved.

[5] Appellant says that the case should be reversed because the trial court permitted in evidence the by-laws of respondent to show absence of authority in its president to execute the guaranty. If this were a case that warranted reliance upon the doctrine of ostensible authority it would be correct, but actual authority or its absence may be shown by by-laws as by the minutes of the company. Furthermore, the evidence in this case indicates, as will be shown later, that knowledge of the instant transaction was never brought by appellant to the respondent corporation, as such, but only to the president personally.

The cases cited by appellant are not analogous to the situation at bar. Newton v. Johnston Organ & Piano Mfg. Co., 180 Cal. 185, 180 P. 7, holds that the ostensible authority of the agents of a corporation to contract for the services of employees of the corporation cannot be overthrown by mere proof that the by-laws or minutes of the company failed to disclose actual authority in the president and secretary to contract. The facts make a clear case of ostensible authority and, in addition, the one relying thereon had received replies from telegrams directed to the corporation. The court

says, referring to the acts of the president and the secretary, that they generally held themselves out as authorized representatives of the corporation in such manner that the corporation and its directors could not well have been ignorant of their assumption of ostensible power.

Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359, holds that the power of corporations to make by-laws for the transfer of their stock does not conclude the power to create liens thereon affecting purchases for value, without notice.

Mancini v. Patrizi, 110 Cal.App. 42, at page 45, 293 P. 828, holds that by-laws cannot be invoked against third persons, and that by the issuance of a stock certificate in regular form, a corporation is estopped against a bona fide purchaser, without notice of facts, even to assert that the certificate had been fraudulently issued; while Aitken v. Stewart, 129 Cal. App. 38, 45, 18 P.(2d) 988, holds that a note and deed of trust, not against public policy or legally obnoxious, but merely ultra vires the power of the corporation as prescribed by its charter is a defense looked upon with disfavor by courts, and that a complaint which alleged that the same were in excess of the by-laws, and which failed to state that the defendant had notice of the requirements, did not state a cause of action.

It would appear that no director of the Virden Company had any knowledge of this guaranty until after the Pioneer's bankruptcy; that it nowhere appeared upon the books of appellant or either the corporate records or books of account of Virden as a contingent liability.

[6, 7] Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004, 1005, holds that "in the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto," citing cases, which rule finds recognition in 1636 of the Civil Code, and it quotes section 1648 of said Code as follows: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Guaranties as contracts are subject to no different rule of interpretation. They should not be construed with technical care because they are usually drawn by laymen, as it is conceded this contract was, but "according to the facts and circumstances accompanying the transaction; holding in view, as the main object, to ascertain and effectuate the intentions of the parties." First National Bank v. Bowers, 141 Cal. 253, 262, 74 P. 856, 860.

Appellant contends that a guarantor desirous of limiting his responsibility to a single transaction should do so in plain and unmistakable terms and upon failure, where unequivocal language supports the inference that the guarantee has been induced by the instrument to extend credit in the belief that it covered more than one transaction, the guarantor should be held to the consequences of his omission. Rindge v. Judson, 24 N.Y. 64; City Nat. Bank of Poughkeepsie v. Phelps, 16 Hun (N.Y.) 158; Kierulff & Ravenscroft v. Koping, 94 Cal.App. 473, 271 P. 353, and Goldman v. Dangerfield, 101 Cal.App. 67, 281 P. 400, holding that, unless the words in which a guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it is generally regarded as continuing until the guaranty is revoked.

The cases of Kierulff & Ravenscroft v. Koping, and Goldman v. Dangerfield, supra, relied upon by appellant, are unequivocal guaranties of additional credit in respective stated amounts. However, we find in the Goldman Case, 101 Cal.App. 67, on page 73, 281 P. 400, 403, the following quotation from 13 California Jurisprudence, page 95: " 'Whether or not a guaranty is continuing must be determined from the language of the instrument, or in case of an ambiguity, by resort to parol evidence of the situation surrounding all the parties, and the guaranty interpreted in the light of such circumstances. The tendency of the decisions in this country, however, has been against construing guaranties as continuing, unless the intention of the parties is clearly manifested so that if there is any doubt as to what was intended, the presumption is against holding the guaranty to be continuing.' "

[8] Against this respondent urges that the use of the word "guaranty" does not, of itself, make the instrument such. Ackley v. Prime, 99 Cal.App. 534, 278 P. 932, and Gard v. Stevens, 12 Mich. 292, 86 Am. Dec. 52, wherein it is held that a person, out of regard to his own interest, is not to be presumed to have become a surety for another without limitation as to time or as to amount unless he had done so in express terms or by clear implication, but where there is no limitation as to either, and there is nothing in the instrument from

which it can be inferred that the guarantor intended to leave it open as to both, it must be understood to refer to a single transaction. This instrument does refer to additional credits as being guaranteed, but from the conduct of the parties about to be adverted to, together with that clause in the instrument which purports to bind the Virden Packing Company to execute a formal document to carry out the purposes of the one in suit, the inference seems irresistible that the parties to this transaction never intended that the Virden Packing Company was to be the everlasting guarantor without limitation in point of amount of credits to be extended by appellant to the Pioneer Fruit Company.

Appellant argues that the fact that the parties may have contemplated the execution of a formal instrument at some later date as evidence of their agreement does not necessarily imply that they had not bound themselves by a present contract, citing Willey v. Goulding, 99 Kan. 323, 161 P. 611, and other cases. But the application of this principle must be considered in the light of the conduct of the parties at bar which indicates that they never had considered their rights as crystallized in the original document as indicating a guaranty for all time until revoked, and, further, the omission of the paper company to demand the execution of such document to be met by refusal on the part of the packing company. Levin v. Saroff, 54 Cal. App. 285, 201 P. 961.

Anderson, credit manager of appellant, deposed to the effect that Mr. Virden drew the guaranty and that the same was given to appellant before it had the note of the Pioneer, indorsed by the Virden Packing Company, to cover the then balance. Upon the trial it was shown that Mr. Anderson, not Mr. Virden, drew the instrument, and that the indorsed note was in his company's hands before the alleged guaranty was received. Anderson testified that when, after the receipt of the instrument in suit, the Pioneer company again fell upon lethargic ways in point of meeting its obligations, that he, accompanied by Mr. Finnerty of his company, called upon Mr. Virden and drew to his attention the Pioneer's nonpayment of its debts, that Mr. Virden said, "You need not worry because you hold the Virden Packing Company's guaranty." Memoranda of conversations with Virden were produced, none of which showed that such suggestion had been made by Mr. Virden. From time to time during the whole course of their business transactions calls were made upon Virden, numerous letters addressed to him and to the Pioneer by the Zellerbach Paper Company, none of which refers to any guaranty, but all of which indicate the purpose to have Mr. Virden personally endeavor to have the Pioneer meet its obligations. Effort was made to have Mr. Virden cause the Virden Packing Company to indorse notes of Pioneer that were given to the appellant, but without success, and that appellant did not seem to regard this instrument as a guaranty by the packing company may be fairly inferred from the letter of August 30, 1929, by appellant to Mr. C. E. Virden, marked "Personal" (Rep. Trans. p. 245): "Dear Mr. Virden: I thought you would be interested in knowing the status of the note account with Pioneer. During the month of August we received two payments $2500 each on this note. The balance still due thereon is $7500, and we feel now that the season is well under way that this Department of your business should carry out their agreement with us. All of the remaining installments totaling $7500 are long ~~now~~ overdue; in fact, the note would be paid in full had the additional extension which we granted been carried out according to its terms. Will you please see that we are not overlooked any longer. Very truly yours, Zellerbach Paper Company by P. H. Anderson, Credit Manager." The note which they were addressing Mr. Virden on was for $25,000, covering a balance due December 31, 1928, from Pioneer Fruit Company to the paper company.

This correspondence appears at pages 222, 224, 226, 228, 229, 236, 237, 238, 239, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and 256, reporter's transcript. Zellerbach (pp. 237, 238) wrote the fruit company on July 13, 1929, of its disappointment that it had not made payment on July 10th of its note, and of its failure to receive the note to cover the June purchases; further, that it was important that the note installments be kept up so that "we can get our contracts clearly defined on this year's purchases. Otherwise your failure to do this might interfere with shipments of your this year's orders," and Pioneer is told that it should not ask ap-

proval of shipments "until details, of account are arranged and terms of payment understood between us."

Anderson, in explanation of the letters, testified that his company was unwilling to let Pioneer have much more credit unless he could find out what they were going to do about paying for it. Rep. Trans. p. 240. It is significant that appellant never communicated directly with Virden Packing Company upon the subject of Pioneer's debt or Virden's agreement of guaranty or agreement to execute one. Rep. Trans., p. 228. To the indifferent person it seems as though this instrument had some esoteric significance, and that the Virden Packing Company as a corporation was not to be let into the secret.

[9] Appellant's claim that respondent is estopped to question the authority of its president to execute the instrument fails because respondent had never held out Virden as authorized, to the knowledge of Zellerbach, to execute on its behalf any contracts, with or without the authorization of its directors. The respondent in this case never made an admission or did any act with the intention of influencing the appellant, nor had appellant any knowledge of the extent to which Virden had, before taking this instrument, assumed to aid the Pioneer Fruit Company, with or without knowledge of respondent's directors. 10 Cal.Jur. 627, § 14, citing cases.

Along in 1930 when the Pioneer Fruit Company could get no more credit and needed paper, Virden, as president of the packing company, made an agreement in July of 1930 with the Zellerbach Paper Company, whereby the packing company bought certain paper from appellant, instructing it to deliver the same to the Pioneer, but no resolution was ever passed by which Virden guaranteed any of the debts of the Pioneer, and the goods purchased under the above arrangement are not in suit. Rep. Trans. p. 447.

[10-12] Plaintiff claims error in the trial court's admitting evidence that the appellant had prepared a claim in bankruptcy against the Pioneer, and that it had been one of the petitioners in the involuntary bankruptcy. This evidence was permitted to throw such light as it might on the question whether appellant regarded itself as a guarantee of the Virden Packing Company. Standing alone, such evidence would have been inadmissible, and the error of the admission of such evidence would have been prejudicial as Zellerbach had the right to pursue its immediate obligor before looking to a guarantor. In the premises it is not material. Further, it complains because the court permitted a showing that Anderson of the paper company had served upon a creditor's committee of Pioneer and had not disclosed the existence of this alleged guaranty. If Anderson had been a member of the general creditor's committee, there would be some point to this complaint, but he was appointed by James who became president of the Virden Packing Company after the death of Virden, and after the institution of the bankruptcy proceedings, with a view to working out, if possible, the salvation of the Pioneer Company, and in the light of the surrounding circumstances this ruling was not prejudicial.

[13] Respondent having proved an absence of knowledge in the directors of the execution of this instrument, appellant assigns as error the trial court's refusal to permit cross-examination to show that the directors knew little or nothing of Mr. Virden's activities generally as president and manager of the company. This ruling did not prejudice the rights of the appellant because there is no room for the application of ostensible agency, and, further, notwithstanding this ruling, everything that it might thereby have shown was fully developed.

It is concluded that Virden had not the authority to execute an unconditional and unlimited guaranty of credits of the Pioneer Paper Company; that the instrument in suit is not such a guaranty but at most was an agreement by Virden to have his company execute a guaranty, that this never was done; and that the judgment should be and is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

11 Cal.App.2d 101

GRANT v. RYON et al.

Civ. 10323.

District Court of Appeal, Second District, Division 1, California.

Jan. 3, 1936.

Rehearing Denied Jan. 23, 1936.

Hearing Denied by Supreme Court March 2, 1936.

1. Appeal and error ⇐1011(1)

All reasonable inferences are to be indulged in favor of trial court's findings of fact on conflicting evidence.

2. Appeal and error ⇐1010(1)

Findings of trial court which were supported by ample evidence would not be disturbed.

3. Automobiles ⇐217(5)

Pedestrian crossing street is not required to continuously look for approaching traffic.

4. Automobiles ⇐244(6, 35)

Evidence that motorist who had unobstructed vision for 100 feet ahead, and who was traveling at speed of 15 to 20 miles an hour, collided with pedestrian crossing lighted street, *held* to support finding that motorist was negligent.

5. Automobiles ⇐242(8)

Motorist being sued for injuries sustained when he collided with pedestrian crossing street had burden of proving that pedestrian was contributorily negligent.

6. Automobiles ⇐244(50)

Evidence that pedestrian, who was halfway across street, observed approaching automobile one and a half blocks away and continued across street without continuously looking at approaching automobile, *held* to support finding that pedestrian with whom automobile collided was not contributorily negligent.

7. Insane persons ⇐94(1)

Appointment of guardian ad litem to maintain action for injury sustained in automobile collision by 60 year old woman with defective memory *held* proper (Probate Code, § 1460).

8. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; O. O. Collins, Judge.

Action by Minnie J. Grant, by D. E. Ward, her guardian ad litem, against Herndon Ryon, William Ryon, and another. From the judgment, the named defendants appeal.

Affirmed.

Elbert E. Hensley, of Los Angeles (W. H. Abrams, of Los Angeles, of counsel), for appellants.

Paul Taylor, of Los Angeles, for respondent.

ROTH, Justice pro tem.

This action is one for personal injuries arising from an accident which occurred at the intersection of Wilshire boulevard and Tenth street in the city of Santa Monica, on October 7, 1932, at or about 6:20 p. m. At the time of the accident defendant Herndon Ryon, who was then a minor, was driving an automobile in a westerly direction on Wilshire boulevard, north of the center line thereof, approximately 12 to 15 feet south of the northerly curb. Both headlights of the car were burning, and the automobile proceeded at a rate of 15 to 20 miles per hour. There was no fog, or rain or other unusual weather conditions; the street was dry, and the driver's vision unobstructed and unobscured. Plaintiff, a woman sixty years of age, dressed in dark clothing and carrying some bundles, was walking from the southerly curb of Wilshire boulevard on the west side of Tenth street in a northerly direction in the center of a pedestrian zone. She had previously alighted from a bus, waited for the bus to move on and for other traffic to pass, and saw no traffic approaching from the east or west until she reached a point immediately north of the center line of Wilshire boulevard, at which time she observed a car driven by defendant a block and a half to the east or to her right. She continued walking northerly in the pedestrian zone, and fixes the point of impact at a distance of 5 or 6 feet south of the northerly curb. Defendant, according to the testimony, when he entered the intersection of Tenth street on Wilshire boulevard, was looking straight ahead at all times up to the time of impact, and by reason of his headlights and electroliers on Wilshire boulevard could see ahead approximately 100 feet. The evidence shows that defendant did not see plaintiff until an instant before the accident.

On evidence supporting the foregoing résumé of facts, the trial court found that the impact between the automobile operat-

ed by Herndon Ryon and plaintiff and the consequent injuries suffered by plaintiff were the proximate result of the negligence of defendant Herndon Ryon, and that there was no contributory negligence on the part of plaintiff, and that the accident was not an inevitable one. The defendant William Ryon is the father of Herndon Ryon, and signed his application for an operator's license, pursuant to the terms of section 62, subdivisions (b) and (c), of the California Vehicle Act (St. 1923, p. 532, as amended by St. 1929, p. 522). At the time the complaint and summons were served upon defendant Herndon Ryon, he was a minor, and at the time of the trial of the action, defendant Herndon Ryon had reached his majority.

[1-4] It is settled that when a trial court has made its findings of fact from conflicting evidence, all reasonable inferences are to be indulged in favor of such findings, and that the power of a reviewing court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusions reached by the trial court. There is ample evidence in the case at bar to support the findings of the trial court; consequently, they cannot be disturbed. Wing v. Kishi, 92 Cal.App. 495, 497, 268 P. 483; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann.Cas. 1916B, 111; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Eveleth v. Goodchap, 5 Cal.App.(2d) 735, 43 P.(2d) 376; Hurtel v. Albert Cohn, Inc. (Cal.App.) 787, 45 P.(2d) 413. The evidence in the case at bar shows that there was one automobile and one pedestrian upon a well-illuminated highway; that the plaintiff took ample care for her protection. While it is true that she may not have looked in the direction of the approaching traffic at every instant of her progress, there is nothing in the law which requires her to do so. Regan v. Los Angeles Ice, etc., Co., 46 Cal.App. 513, 189 P. 474; Du Val v. Boos Bros. Cafeteria Co., 45 Cal.App. 377, 187 P. 767; Baldock v. Western Union Tel. Co., 127 Cal.App. 141, 15 P.(2d) 199; Pinello v. Taylor, 128 Cal.App. 508, 17 P.(2d) 1039.

[5, 6] The finding of the trial court that there was no contributory negligence is amply supported by the evidence. The burden of showing contributory negligence is upon the defendant. Daly v. Hinz, 113 Cal. 366, 45 P. 693; Drouillard v. Southern Pacific Co., 36 Cal.App. 447, 172 P. 405. As said in the case of Flach v. Fikes, 204 Cal. 329, 332, 267 P. 1079, 1080: "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. * * * Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court." Potter v. Driver, 97 Cal.App. 311, 275 P. 526; Filson v. Balkins, 206 Cal. 209, 273 P. 578.

[7] Defendant complains that a guardian ad litem was improperly appointed, since there was no showing that plaintiff was mentally defective. The order appointing the guardian ad litem was made ex parte and is regular and valid upon its face. At the time of the trial, the following proceedings were had:

"Q. By the Court: Are you at this time, Mrs. Grant, so far recovered that you are able to think for yourself, know what you want to do, and what you don't want to do in regard to this lawsuit? A. Well I feel this here way: I am competent to take care of myself in this action but not in this lawsuit, for I don't know anything about lawsuits; I have never been in court before.

"Q. Do you still wish your nephew to act as your guardian ad litem? A. Yes, sir.

"Q. For the maintenance of this action? A. Yes, sir.

"Q. For and on your behalf? A. Yes, sir.

"Q. Do you at this time ratify his acts in bringing this suit for you in January 1933? (Objection and argument.)

"Q. By the Court: Do you at this time approve the appointment of Mr. Ward as your guardian as of date of January 30, 1933, at which time the presiding judge of the Superior Court appointed Mr. Ward your guardian ad litem to maintain this action? A. I do.

"The Court: That is all."

In addition, medical and other evidence was sufficient to justify the court in concluding that Mrs. Grant was not the "same as any other woman her age," and that as a result of the injuries suffered in the

accident she was left with a defective and impaired memory. Section 1460 of the Probate Code provides that, " 'incompetent' * * * shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." The same Code section provides that a general guardian may be appointed for such an "incompetent" person. In our opinion, it is proper under the same circumstances, to appoint a guardian ad litem.

[8] The judgment and the order denying motion for a new and different judgment are affirmed. The appeal from the order denying motion for new trial is dismissed, as there is no appeal from such an order.

We concur: YORK, Acting P. J.; DORAN, J.



10 Cal.App.2d 745

CRESSEY v. CITY OF LOS ANGELES et al.

Civ. 10575.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1935.

Hearing Denied by Supreme Court Feb. 17, 1936.

1. Municipal corporations ⇐819(1)

In action against city, evidence sustained fact findings in favor of plaintiff who was injured when she stepped backward into unpaved circular area in sidewalk 4 feet in diameter and 3 inches in depth as she sought to avoid smoke from automobile at curb toward which she had been proceeding.

2. Municipal corporations ⇐791(2)

Municipality is liable for damages resulting from defective condition existing in one of its sidewalks, if it has constructive notice of dangerous condition and reasonable time in which to remedy it.

3. Appeal and error ⇐1008(1)

Whether dangerous condition in sidewalk has existed for sufficient length of time to constitute constructive notice to city, and whether reasonable time to remedy condition has elapsed, are fact questions for trial court.

4. Municipal corporations ⇐788(2)

Where removal of tree under direction of city left hole in sidewalk, city which maintained street inspector to examine sidewalks *held* to have actual knowledge of existence of such defect which had existed over two months.

5. Appeal and error ⇐996

Where reasonably prudent men could draw different conclusions from evidence, finding of trial judge that plaintiff was free from contributory negligence would not be disturbed.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Laura H. Cressey against the City of Los Angeles and others. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Ray L. Chesebro, Frederick Von Schrader, Leon Thomas David, and Thatcher J. Kemp, all of Los Angeles, for appellant.

Randall J. Hood, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after a trial by the court without a jury.

Viewing the evidence most favorable to respondent (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

The sidewalk on the Leeward avenue side of the First Baptist Church in the City of Los Angeles is paved from the property line to the street curb with the exception of several areas in which trees were growing at the time the improvement was made. February 14, 1934, the civil works administration workers, under the direction of appellant, removed one of these trees, leaving an unpaved circular area four feet in diameter and three inches in depth. This space remained unpaved to and including April 26, 1934. During this period appellant's board of public works, having authority to remedy dangerous or defective conditions in sidewalks, through its engineering department, maintained a street inspector whose district included the sidewalk in question. This inspector, legal holidays excepted, was engaged in covering the district continually during the period from February 14, 1934, to April 26, 1934. At noon on the latter date respond-

dent, while standing on the northeast corner of Westmoreland and Leeward avenues, was hailed by the driver of an automobile parked in front of the Leeward avenue entrance to the church; whereupon she crossed to the southeast corner of the streets and then proceeded sixty or seventy feet easterly to the automobile. Respondent took one or two steps back from the curb, due to the fumes arising from the car. The motor then started, emitting a large quantity of smoke; whereupon she took two or three more steps back and fell into the unpaved area left by removal of the tree and received personal injuries.

Appellant relies for reversal of the judgment on three propositions:

First. The evidence is insufficient to support the findings of fact.

Second. The appellant municipality did not have notice of the dangerous and defective condition existing in the sidewalk.

Third. Respondent was guilty of contributory negligence as a matter of law.

[1] As to appellant's first proposition, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact in favor of respondent. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Koeberle v. Hotchkiss (Cal.App.) 48 P.(2d) 104.

[2, 3] As to appellant's second proposition, the appellant municipality is liable for damages resulting from a defective condition existing in one of its sidewalks, if it has constructive notice of the dangerous condition and a reasonable time to remedy the same has elapsed. It is a question of fact for the trial court to determine under all the facts and circumstances in evidence whether the dangerous condition in the sidewalk has existed for a *sufficient length of time* to constitute *constructive notice* and also whether a *reasonable time to remedy* the condition has elapsed. Wise v. City of Los Angeles (Cal.App.) 49 P.(2d) 1122; Hook v. City of Sacramento, 118 Cal.App. 547, 554, 5 P.(2d) 643.

[4] In the present case the defective condition had existed for two months and twelve days. In Wise v. City of Los Angeles, supra, the existence of a defective condition in a public street for four or five days was held to be substantial evidence under the circumstances of that case to sustain a finding of the trial court that the defect had existed for a sufficient length of time to constitute constructive notice to the appellant municipality and a reasonable time within which to remedy the condition under the Public Liability Act of 1923, St. 1923, p. 675, Act 5619, Deering's General Laws, volume 2, p. 3052.

Furthermore, in view of the evidence the appellant municipality had actual knowledge of the existence of the defective and dangerous condition of its sidewalk, the facts in the instant case on this point are analogous to and the principle of law is identical with that in the case of Hook v. City of Sacramento, 118 Cal.App. 547, at page 553, 5 P.(2d) 643, 645, wherein Mr. Presiding Justice Preston says: "It is inconceivable that a man engaged in examining and inspecting streets and sidewalks would overlook a defect 18 inches to 2 feet long. Therefore, sufficient evidence was shown that appellant had actual knowledge of the existence of the dangerous and defective condition of said apron for at least two months prior to the accident."

Appellant's final proposition is answered by an unbroken line of decisions in this state holding contributory negligence on the part of the respondent a question of fact for determination by the trial judge, whose finding will not be disturbed by this court, if there is substantial evidence in support thereof. In Van Praag v. Gale, 107 Cal. 438, at page 443, 40 P. 555, 556, a case in which the plaintiff walked into an open trapdoor on the sidewalk, Mr. Commissioner Searls says:

"The gist of the contention in the present case, although not expressed in so many words, seems to be that as there is no conflict in the testimony, the facts are established, and it is the duty of the court to decide the issue as a question of law.

"But it by no means follows that the facts are admitted because there is no conflict in the testimony.

"Negligence is not ordinarily proven by direct and positive testimony. and is not so proven in this case. What the plaintiff did is established without dispute and beyond cavil. But whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would

have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded.

"It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law; and, when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions."

[5] In the case before us, an examination of the record discloses that reasonably prudent men could draw different conclusions from the evidence educed before the trial judge. Therefore his finding that respondent was free from contributory negligence will not be disturbed by this court.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 752

NAGAMATSU v. ROHER.

Civ. 1460.

District Court of Appeal, Fourth District, California.

Dec. 20, 1935.

Hearing Denied by Supreme Court Feb. 17, 1936.

1. Automobiles ⇐244(11)

Evidence sustained verdict for plaintiff for death of driver of automobile colliding with defendant's automobile near center of intersection in such manner that both automobiles came to rest in ditch running parallel to street on which deceased was driving.

2. Appeal and error ⇐1053(2)

In automobile collision case, giving of testimony that defendant's automobile was repaired at request of auto club *held* not reversible error on ground that insurance was disclosed to jury, where testimony was subsequently stricken and jury instructed to disregard it.

3. Trial ⇐240, 260(3)

In automobile collision case, refusal of charge instructing jury to consider physical facts *held* not error, where instruction was argumentative, mentioned facts not in existence, and jury was otherwise instructed to consider all evidence and inferences deducible therefrom.

4. Trial ⇐252(8), 253(4)

Refusal of instruction that deceased motorist had duty to yield right of way if defendant motorist reached intersection first *held* not error, where instruction did not cover situation in event automobiles reached intersection at same time and was not supported by evidence.

5. Trial ⇐260(8)

Refusal of instruction that defendant motorist would not be liable for collision if deceased motorist was driving without his headlights burning and this proximately contributed to accident *held* not error, where matter was covered by instructions on contributory negligence and by reading statute requiring vehicles to be equipped with lights (St. 1923, p. 546, § 99).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by S. Nagamatsu against H. C. Roher. Judgment for plaintiff, and defendant appeals.

Affirmed.

Irving E. Read, of Los Angeles (Walter F. Keen, of Los Angeles, of counsel), for appellant.

J. Marion Wright, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for the death of a son of the plaintiff who was killed in a collision between an automobile driven by the deceased and another automobile driven by the defendant. The accident occurred at the intersection of Smeltzer avenue and Cannery street, in Orange county, about 6:30 p. m. on October 22, 1931. Cannery street runs north and south, and Smeltzer avenue east and west. There was an unobstructed view in all directions at this intersection, but it was dark at the time the accident occurred. The deceased was driving north on Cannery street, and the defendant was driving east on Smeltzer avenue. The two cars met near the center of the intersection and came to rest in a ditch 7 or 8 feet deep which runs parallel to Cannery street, near its easterly edge. The car driven by the deceased was upside down in this ditch, about opposite the north line of Smeltzer avenue, and the

car driven by the defendant was standing on its radiator in the ditch about 35 or 40 feet north of the other car. The jury returned a verdict in favor of the plaintiff, and from the judgment entered the defendant has appealed.

[1] It is first contended that the evidence is not sufficient to sustain the verdict because the evidence for the respondent is so improbable that it cannot be believed and because and so-called physical facts, "backed up by the law of physics," clearly demonstrate that the accident occurred because of the negligence of the deceased.

Considering first the claimed improbability of the respondent's evidence: It is first argued that the respondent's testimony, to the effect that he saw the appellant's automobile coming from the west when it was a certain distance away, cannot be believed because the respondent also testified that he could only see a much shorter distance in front of the automobile in which he was riding. We see nothing unusual in the fact that the lights of another car approaching on a crossroad can be seen at a much greater distance than that at which objects may be distinguished by the aid of headlights on the car in which the observer is riding. It is further argued that the respondent testified that when his son's car, going 15 miles an hour, entered the intersection he saw the appellant's car about 200 feet west of the intersection, that it thus appears that the respondent's car would travel 12 feet while the appellant's car traveled 209 feet, and that to do this the appellant's car would have had to travel at a speed of approximately 270 miles an hour, which is obviously impossible. Such arguments, frequently made in such cases as this, are of small value because of the many uncertainties in the premises which are assumed. This is well illustrated here. It is in evidence that there was an 18-foot pavement on each of these streets. The appellant assumes that the impact occurred on the exact center line of Smeltzer avenue and, therefore, assumes that the respondent's car traveled 9 feet on that pavement. For some reason he assumes that this car traveled an additional 3 feet. The entire width of Smeltzer avenue does not appear in the evidence. Assuming it is one of the 60-foot streets, there would be 30 feet between the beginning of the intersection and the center line of that street. There is testimony that the impact occurred north of the center line of Smeltzer avenue and in the northeast corner of the intersection. The impact may have taken place several feet north of this center line, and since the witnesses' testimony was only an estimate, an allowance of several feet at least should be made for the position of the respondent's car when he says he was entering the intersection. Again, there is no possibility of mathematical exactness in such testimony as to the position and speed of another car. As is well known, such estimates of speed and distance are only approximations and in the nature of things could not be exact. For example, the witnesses here testified as to how many telephone poles, respectively, the two cars were from the intersection when the occupants of the deceased's car observed the other car. They then estimated that the telephone poles were about 100 feet apart although it developed that they were, in fact, 150 feet apart. Allowing for the same natural error on the part of the witnesses in estimating how far the appellant's car was from the intersection at the time they entered it, that car would have been about 133 feet west of the intersection instead of 200 feet. As indicated above, the distance traveled by the deceased's car may well have been nearer 40 feet than 12 feet. All of the witnesses expressed an inability to give the distances and speeds exactly. Under such circumstances, the testimony in question is not so improbable as is claimed. There was other testimony which more directly supported the verdict, and the most that can be said is that there was some conflict in the evidence.

It is argued that the condition and position of the cars after the accident, with the laws of physics, conclusively prove that the car driven by the deceased was going much faster than the other car and that it struck the appellant's car, knocking it some distance to the north. As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element, what may have been done by the respective drivers, and because of the many uncertainties which necessarily exist in such matters as the respective weights of the cars, the respective speeds, the exact positions, the force and direction of the blows, and many other elements. Fishman v. Silva, 116 Cal.App. 1, 2 P.(2d) 473; Johnston v. Peairs, 117 Cal.App. 208, 3 P.(2d) 617; Holt v. Yellow Cab Co., 124 Cal.App. 385, 12 P.(2d) 472; Anderson

v. Ott, 127 Cal.App. 122, 15 P.(2d) 526; Hawthorne v. Gunn, 123 Cal.App. 452, 11 P.(2d) 411, 412. In the last case cited this court said: "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred." This is peculiarly true in the instant case for an additional reason. The one car was found upside down in a deep ditch after having passed through the railing of a bridge and the other car was standing on its front end in the same ditch. It is impossible to tell from the condition of the cars, the main physical evidence relied upon, what part thereof resulted from the collision and what part from the fall.

[2] It is next urged that the respondent's attorney committed reversible error in asking a question because the answer thereto may have disclosed to the jury that an insurance company was involved. A garage man testified that he superintended the repair of the appellant's car and as to its condition. On cross-examination the respondent's attorney asked this witness who had requested him to make an estimate on the cost of repairing the car. He replied that he had been asked to do so by Mr. Read, the appellant's attorney. He was then asked: "Who else?" And he replied: "The Auto Club." Being then asked if he repaired the car at the request of the Auto Club of Southern California he replied in the affirmative. Immediately thereafter, in the absence of the jury, appellant's counsel asked the court to declare a mistrial. This request was denied, and after the jury was brought back the court struck out the testimony relating to the automobile club and instructed the jury to disregard the same. There was no direct reference to an insurance company and the auto club in question performs many functions besides the writing of insurance. Even the reference to this club was brought out incidentally, the matter was not repeated, and we think no such intentional violation of the rule appears as would require a reversal. Under these circumstances, the action of the court in striking out the testimony and admonishing the jury to disregard the same was a sufficient protection of the appellant's rights.

[3] The final contention is that the court erred in refusing three instructions offered by the appellant. The first of these, apparently based upon the appellant's theory that the physical facts were controlling, instructed the jury to take into consideration the physical facts, many of which are particularly mentioned. The instruction was argumentative, mentioned facts not in evidence, and invited the jury to take into consideration "your own experiences in life." Not only was this instruction properly refused, but the court, in other instructions, told the jury to consider all of the evidence and the inferences which might be deduced therefrom.

[4, 5] The second of these instructions was to the effect that if the jury believed that the appellant reached the intersection first he had the right of way, and it was then the duty of the deceased to yield such right of way. The instruction was not complete in that it failed to cover the situation in the event the cars entered the intersection at the same time. The appellant claims that he was entitled to this instruction in support of his theory that he entered the intersection first. The fact remains that there was no evidence to support that theory. We have carefully gone over the evidence and can find none that would even justify the inference that he entered the intersection first. The third instruction complained of was to the effect that if the jury believed the deceased was driving without his headlights burning and that this proximately contributed to the accident, the respondent could not recover. The court covered this matter in its other instructions by reading to the jury section 99 of the California Vehicle Act (St. 1923, p. 546). With respect to the last two instructions mentioned, it may also be said that the court gave full and complete instructions with respect to the matter of contributory negligence on the part of the deceased.

We find no reversible error, and the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

FITZGERALD v. TERMINAL DEVELOPMENT CO. et al.*

TERMINAL DEVELOPMENT CO. v. FITZGERALD et al.

Civ. 5506.

District Court of Appeal, Third District, California.

Jan. 6, 1936.

Rehearing Denied Feb. 5, 1936.

Hearing Denied by Supreme Court March 5, 1936.

1. Corporations ⇐432(12)

Corporate seal on deed conveying realty and signed by president and secretary *held* prima facie evidence of officers' authority to execute deed, which must therefore be accepted as corporate act, in absence of contrary evidence.

2. Deeds ⇐194(2)

Deed being found in grantee's possession, due delivery is presumed.

3. Husband and wife ⇐273(8)

Where wife of deceased president, who was also large stockholder, joined in deed conveying community realty to corporation with view to increasing security for bonded indebtedness, deed reconveying realty to wife and signed by president and secretary, even if not corporation's deed, *held* to convey husband's interest, making realty separate property of wife, and deed bound surviving stockholder and corporation, which had constructive notice of wife's claim, in absence of pleading or proof as to status of bona fide purchasers for value without notice.

4. Vendor and purchaser ⇐242

In suit by president's grantee to quiet title, defendant corporation and stockholder, if claiming to be bona fide purchasers for value without notice, had burden of proving such lack of notice.

5. Husband and wife ⇐267(7)

Where president's wife joined in deed conveying mortgaged community realty to corporation with view to increasing security for bonded indebtedness, and after reconveyance of realty to wife by deed signed by president and secretary, corporation paid off mortgage for its own benefit, wife *held* not obligated to reimburse corporation for such voluntary act.

6. Husband and wife ⇐263

Where deceased president's wife joined in deed conveying community realty to corporation with view to increasing security for bonded indebtedness, and subsequently received reconveyance of realty by deed signed by president and secretary, and thereafter brought suit to quiet title against corporation and surviving stockholder, testimony of transaction between wife and husband, both individually and as president, claimed to be admissible on grounds that testimony tended to establish trust and fix consideration, and to show delivery, and conversion from community to separate property, *held* improperly excluded; testimony being relevant at least to some of such grounds.

7. Husband and wife ⇐265½

Where president's wife, having received through mail assurance, signed in corporation's name by president and secretary, that realty would be reconveyed to wife, joined in deed conveying community realty to corporation with view to increasing security for bonded indebtedness, and subsequently received deed reconveying realty and bearing corporate seal and signed by president and secretary, wife, bringing action to quiet title against corporation and stockholder, *held* not estopped on theory that wife placed her agent in position to contract with third person as if agent were owner of realty.

8. Process ⇐68

Court *held* to have acquired jurisdiction of party served with copy of summons and complaint.

9. Appearance ⇐19(1)

Court *held* to have acquired jurisdiction of party who entered appearance personally signed by her and acknowledging service of summons and complaint and agreeing to answer within specified time.

10. Judgment ⇐651

Where corporation filed answer in interpleader action setting up ownership or right of possession of certain documents, including insurance policy on president's life, and answer was served on president's attorneys, ownership of policy *held* adjudicated by final decree entered pursuant to stipulation that answer be withdrawn and that decree be entered giving documents to corporation, and hence in subsequent action by deceased president's wife against corporation, court properly found that corporation was owner of such policy.

11. Judgment ⇐651

Consent judgment is as conclusive on matters at issue and determined thereby as judgment rendered after trial.

12. Executors and administrators ⇐431(2)

Creditor *held* not entitled to enforce judgment in absence of presentation of claim against deceased debtor's estate (Probate Code, § 730).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 55 P.(2d) 194.

Action by Lillian Ryan FitzGerald against the Terminal Development Company and another, with a cross-complaint by the named defendant against plaintiff individually and as administratrix, and others. From an adverse judgment, plaintiff and cross-defendant appeals.

Reversed.

Treadwell, Laughlin & Treadwell, of San Francisco, and Rex Hardy, of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Prior to November, 1921, defendant the Terminal Development Company, whose name was then Los Angeles Market Company, a corporation, owned a twenty-year ground lease on certain property in Los Angeles. This corporation was controlled by the Southern Pacific Company, who was represented by Roy C. Seeley in negotiating with the postoffice department of the federal government to lease the property for a postoffice site.

Gerald FitzGerald came into the deal, and Seeley and FitzGerald then proceeded to acquire all of the stock of the Los Angeles Market Company, they entering into an agreement reciting that one-half of the shock was owned by Seeley and the other one-half was owned by FitzGerald, although all of the stock except certain qualifying shares stood in the name of FitzGerald. A lease to the government was executed which required that the corporation or FitzGerald and Seeley finance the cost of construction of the postoffice building. The method of financing agreed upon was that bonds should be sold, the California Trust Company being trustee thereof, and that the bonds should be secured by assignment of the lease on the property, together with certain property belonging to FitzGerald, which consisted of the home and residence of Mr. and Mrs. FitzGerald referred to herein as the Shatto place residence; 250 shares of stock in the Union Terminal Warehouse Company, and also a policy of life insurance on the life of FitzGerald in the sum of $100,000. The Shatto place property stood in the name of FitzGerald but was in fact community property of FitzGerald and his wife and was subject to a mortgage in the sum of $27,500. FitzGerald discussed with his wife, appellant herein, the matter of joining in a transfer of this property to the company, but she demurred. However, FitzGerald submitted to the company the matter of conveying the Shatto place property to the trustee for the benefit of the corporation, and on July 12, 1922, the board of directors, five of the seven being present, passed a resolution that the company acquire from FitzGerald the Shatto place property "upon terms and conditions to be hereinafter set up and determined between the company and FitzGerald."

On July 15, 1922, the following communication was received by Mrs. Fitzgerald through the mail:

"Los Angeles, July 15, 1922.

"Mrs. Lilliam FitzGerald, Los Angeles, California.

"Dear Mrs. FitzGerald: "In accordance with resolution adopted by the Board of Directors of the Los Angeles Market Company on July 12, 1922, this is to inform you that the Los Angeles Market Company has agreed with Gerald FitzGerald that in consideration of your affixing your signature to a grant deed conveying Lot 15, Block 5, Shatto Place, Los Angeles, to the Los Angeles Market Company, that company hereby agrees to deed and grant said Shatto Place property to you so that it will be your sole property, free and clear of any and all incumbrances whatsoever, as and when the money borrowed by the Los Angeles Market Company for the development and construction of the Arcade Postoffice is paid and for which said Shatto Place property is used as security.

"The Los Angeles Market Company,

"By (Signed) Gerald FitzGerald, President,

"By (Signed) L. C. Roeber, Secretary."

Upon the receipt of this letter plaintiff then joined in the execution of a deed, which conveyed the Shatto place property to the company.

On August 17, 1922, Mrs. FitzGerald received a deed to the Shatto place property reconveying the same to her, signed by FitzGerald as president and Roeder as secretary, and attached to it was the seal of the corporation. On September 5, 1922, the company advanced the money to pay off the indebtedness and the mortgage was satisfied of record. On July 28, 1932, the bond issue, which had been issued some ten years prior thereto, was about to mature, and in order to obtain money to meet a balance due thereunder, the company

borrowed from the California Bank the sum of $45,000, giving as security various properties, including the Shatto place, both Mr. and Mrs. FitzGerald joining in this mortgage to the bank. On January 1, 1933, this loan of $45,000 became due, there still remaining a balance unpaid of approximately $12,000. That amount was borrowed from the Pacific Mutual Life Insurance Company on a $100,000 policy on the life of FitzGerald, and the Shatto place property was released from the deed of trust. The trust company, however, refused to terminate the trust or to distribute the various properties it had held, without the written consent of the pledgors, including Mr. and Mrs. FitzGerald. They, however, refused or declined to sign the form of release submitted by the trust company, and thereupon the California Trust Company brought an action in interpleader against Mr. and Mrs. FitzGerald and the Terminal Development Company, alleging that it held in its possession the life insurance policy, warehouse stock, the Shatto place property, the ground lease of the postoffice site, together with certain other property and prayed that the defendants set up their respective rights thereto. Various answers and a cross-complaint were filed setting up the transactions between the parties. However, this matter was never brought to trial, as the parties through their respective counsel stipulated for a final decree, dismissing the answers and cross-complaint filed in the action, and provided among themselves for the disposition of the property held by the trust company. In the final decree signed in pursuance to this stipulation, it was adjudged that the Terminal Development Company was the owner of the life insurance policy in the sum of $100,000 issued on the life of FitzGerald, and that FitzGerald was the owner of certain shares of stock in the United Terminal Warehouse Company. We will refer to this stipulation again later. All reference was omitted in regard to the Shatto place property for the reason that Mrs. FitzGerald was making claims to the property, free of incumbrance, and action in regard to that dispute was left open for further litigation.

Thereafter and after the death of FitzGerald, Lillian Ryan FitzGerald, the plaintiff and appellant herein, brought this action in the nature of a suit to quiet title in her individual capacity against the Terminal Development Company and Roy C. Seeley for a judgment that she was the owner in fee simple of the Shatto place property, free of incumbrance as against those defendants. Seeley disclaimed any interest in the property, but the Terminal Development Company filed an answer denying that plaintiff was ever the owner of the property or that there was ever any agreement to reconvey the property to her free of incumbrance, or otherwise, but did admit that FitzGerald had conveyed the property to defendant for the purpose of hypothecating the same as additional security for the bonded indebtedness; that this conveyance was made pursuant to an agreement made with FitzGerald, by virtue of which defendant paid the mortgage of $27,500, which was to be reconveyed to FitzGerald provided it was reimbursed for the amount paid out on the mortgage. By way of cross-complaint defendant set forth a history of the transaction, making Mrs. FitzGerald a party as well as certain judgment lienors, including Hickey Pipe & Supply Company. All cross-defendants defaulted except Mrs. FitzGerald and Hickey Pipe & Supply Company, which latter company filed an answer claiming its judgment superior to the redemption right of the FitzGeralds, but subordinate to defendant's lien, and the findings and decree were in accord with those contentions.

This appeal treats with two physical properties, the Shatto place property and the policy of life insurance. Turning our attention first to the real property, the crux of the matter appears to be whether or not title vested in Mrs. FitzGerald by the deed of August 17, 1922, either through the conveyance by the corporation or by virtue of the conveyance from FitzGerald to her.

It is the contention of defendant that this deed was not executed or delivered in such manner as to be the deed of the corporation, in that it was not delivered and that the officers executing it were not authorized to do so by resolution of the board of directors. The court in its finding has sustained this claim. The finding is, "* * * and it is true that on or about August 17, 1922, there was also delivered to her by her said husband, a reconveyance of said Shatto Place property to plaintiff, and which deed also bore the signature of said Gerald FitzGerald as president, and one L. C. Roeber, who was then the secretary of defendant, and was purported to have been signed by them in behalf of this defendant and under the corporate seal thereof, but neither the said

agreement nor the said deed was ever authorized to be signed by defendant by its Board of Directors or otherwise, and the same was signed and delivered to her as aforesaid without any authorization whatsoever, and neither said agreement nor said deed ever became binding upon this defendant at all."

[1, 2] Was the conveyance the deed of the corporation? It bore the seal of the corporation which was prima facie evidence of the authority of the officers to execute it. It is unnecessary to cite the wealth of authority in support of this statement. In 6a, California Jurisprudence 268, where many authorities are cited, it is said:

"The seal of a corporation affixed to an instrument is evidence that the writing is a corporate act. The modern and statutory rule is that the seal itself performs no further or greater function than to import prima facie verity of the due execution by the corporation of its written obligations, that is, it merely stands as prima facie evidence that the contracts made by a corporation are executed by its authority. The rule applies to both foreign and domestic corporations.

"Applying the foregoing principles, where the seal appears to be affixed to an instrument and the signatures of the proper officers are proved, courts presume that the officers did not exceed their authority and that the instrument was executed by authority of the corporation. It follows that the burden in such cases is shifted upon the adversary party to overcome that presumption by showing want of authority in the officers to execute the instrument as that of the corporation. However, the showing is prima facie only and subject to be overthrown by proof of the fact that authority was lacking; but until overcome by other evidence, this prima facie showing of due execution is sufficient. The mere fact that the record of the board of directors does not disclose such authority is not of itself conclusive proof in that regard; and the presumption of authority to affix the seal will not be overcome by the mere fact that there was no vote of the directors on the subject."

An examination of the reporter's transcript fails to show any evidence to overcome this prima facie evidence. There is no evidence that there was no meeting of the board of directors at which the deed was authorized, nor did defendants prove the directors did not know of the execution thereof. The minutes of the corporation were not introduced to prove that there was no resolution authorizing the execution of the deed. L. C. Roeber, secretary and one of the directors, admitted on the witness stand that he knew of the deed and signed the same as secretary of the corporation. He was not asked, however, whether any of the other directors knew of the deed, nor was he asked whether or not the matter was passed at a meeting of the board of directors, nor was he asked whether there was any resolution in the minutes authorizing the execution of the deed. Defendant therefore failing to overcome the prima facie evidence that the deed was the act of the corporation, we must accept the deed as a corporate act; also the instrument being found in the possession of plaintiff, a presumption of due delivery arises. 9 Cal.Jur. 185.

[3, 4] Should we assume, however, that the deed was not that of the corporation, it was, nevertheless, a sufficient conveyance to convey title from FitzGerald to his wife, and title would thereby vest in Mrs. FitzGerald as her sole and separate property.

No showing was made that the records in the office of the county recorder disclosed any conveyance or transfer superior to the deed of August 17, 1922, to plaintiff, and neither has the defendant, by any pleading, relied upon the recordation statutes. They are bound by the deed because they neither pleaded nor proved that they were bona fide purchasers for value without notice, and here again the burden rests on them to prove such lack of notice if it existed. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Davis v. Ward, 109 Cal. 186, 190, 41 P. 1010, 50 Am.St.Rep. 29; County Bank v. Fox, 119 Cal. 61, 64, 51 P. 11; Eversdon v. Mayhew, 65 Cal. 163, 167, 3 P. 641; Smith v. J. R. Newberry Co., 21 Cal.App. 432, 131 P. 1055.

Therefore, it seems under the evidence here produced, that title to the property in question vested in Mrs. FitzGerald either by the deed from the corporation or by virtue of the fact that FitzGerald conveyed his interest to the property in question by his execution of the purported corporate deed, and defendant had constructive notice of plaintiff's claim thereto by her.

[5] In September, 1922, the market company paid off the mortgage, which was some two months after the transfer of title

to plaintiff. The company, in paying off the mortgage, did not do so at the request of Mrs. FitzGerald, but upon its own account and for its own benefit, and plaintiff therefore could not be held obligated to reimburse it for this voluntary act.

It is true that defendant attempted to establish the lack of delivery to Mrs. FitzGerald by introducing various subsequent transactions between the corporation and FitzGerald, to which transactions plaintiff was not a party, but in view of the prima facie evidence of authority of the officers of the corporation to execute the deed, we do not believe that such authority was overcome. We cannot see how FitzGerald could legally create a lien on the property which he had several months previously either conveyed or caused to be conveyed to plaintiff as her separate estate.

[6] Appellant claims the court erred in refusing to permit testimony of the transaction between FitzGerald, both individually and as president and manager of the corporation, and herself, upon the ground such evidence tended to establish a trust in the property conveyed; also it tended to fix the consideration for the conveyance, and to show delivery, and a conversion of the property from community to separate property. Without discussing this point with greater particularity, we believe the testimony was relevant and the court erred in sustaining the objections of the foregoing line of examination, as it was relevant at least to some of the objects mentioned.

[7] Respondents claim that Mrs. FitzGerald, having placed her agent in a position to contract with a third party as if said agent were the owner of the property, is now estopped to question the transaction. No particular pleading presents this defense, but nevertheless the facts themselves do not justify the claim of respondent. FitzGerald, as the president and general manager of the corporation, was, in the belief of plaintiff, the owner of all of the stock of the corporation. Prior to joining in the deed to the company, she received by mail, first, a written assurance in the name of the corporation, signed by its president and secretary, that the property would be reconveyed to her as her separate property upon the payment of the bonds, and later was tendered and accepted a deed executed in the name of the corporation by its president and secretary and under its corporate seal. All this was in accordance with the previous understanding that she had had with FitzGerald as to the conveyance to her of the property as her separate property. We fail to see, therefore, wherein plaintiff was holding her agent out any more than the corporation was negligent in permitting its officers to abuse its trust and confidence, if such were the case.

[8-10] Directing our attention now to the policy of insurance in which the court found that neither FitzGerald nor his estate had any interest. It will be recalled that an interpleader suit which the trust company filed against the Terminal Development Company, Gerald FitzGerald, Lillian Ryan FitzGerald, and Roy C. Seeley was filed to have determined to whom it would deliver the property which it held to secure the bond issue which had then been paid. FitzGerald was served with a copy of summons and complaint on August 5, 1933. On September 12, 1933, Mrs. FitzGerald entered an appearance personally signed by her wherein she acknowledged service of summons and complaint and agreed that she would file her answer on or before a certain date. It therefore is apparent that the court acquired jurisdiction of both Mr. and Mrs. FitzGerald. The record also shows that defendant Terminal Development Company filed an answer in which it set up ownership or right of possession of all documents, including the policy of insurance. This answer was served upon certain attorneys who accepted service as attorneys for defendant FitzGerald, and later a second attorney appeared for both Mr. and Mrs. FitzGerald.

Thereafter it was stipulated that the answer of defendant herein should be withdrawn and that a final decree be made and entered authorizing all of the documents be delivered to Terminal Development Company, and in accordance therewith final judgment was entered October 24, 1933. It is apparent, therefore, that the ownership and right of possession of the insurance policy involved here was a part of the subject-matter of the cause of action described in the complaint and that that issue was adjudicated.

[11] A consent judgment is just as conclusive as to these matters at issue and determined by it as a judgment rendered after trial. 13 Cal.Jur. 133; City of Oakland

v. Oakland Water Front Co., 162 Cal. 675, 124 P. 251; Moore v. Schneider, 196 Cal. 380, 238 P. 81.

An examination of the record also discloses that aside from the legal issue, the court was justified from the facts in finding as it did as to the insurance policy. The original application for the policy designated as beneficiary the Los Angeles Trust & Savings Bank as trustee. That bank being trustee under defendants' trust to secure its bond issue, all the premiums amounting to more than $2,700 a year were agreed to be paid and were paid by defendant. In December, 1930, FitzGerald gave to Seeley an option to purchase his one-half of the stock in the corporation wherein it was provided that "upon payment by FitzGerald to the Terminal Development Company of a sum equal to the cash surrender value of that policy," he could take over and receive the benefit of the $100,000 life insurance policy.

It appears that in February, 1933, FitzGerald applied to the Pacific Mutual Life Insurance Company for a policy of insurance upon his life for $50,000 for business purposes, and at that time inquired whether or not defendants had kept up the premiums on the $100,000 policy, because if they had not, he wanted to take up the policy and get it back.

We believe the finding of the trial court as to the ownership of the policy of insurance is therefore amply supported both by the admissions, stipulations by the evidence of facts themselves, and judgment in the interpleader suit.

[12] As to the claim of Hickey Pipe & Supply Company, no brief was presented upon their behalf, and it does not appear that any claim was ever presented as required by section 730 of the Probate Code, against the estate of FitzGerald, who died November 1, 1933. Inasmuch as the Hickey Pipe & Supply Company could not enforce its judgment otherwise than by the presentation of such claim, and no claim having been presented, they have no standing before the court.

For the reasons given, judgment should be reversed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

11 Cal.App.2d 118

VINTHER et al. v. SUNSET MUT. LIFE INS. CO.

Civ. 10419.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1936.

1. Insurance ⇐388(4)

Test whether health and accident insurer waived forfeiture for nonpayment of premium on due date was whether insurer's conduct induced insured to believe payment within reasonable time after due date would be accepted, and had acted accordingly, and that until some notice was given more specific than that given forfeiture would not be insisted upon.

2. Insurance ⇐668(3)

In action on health and accident policy containing provision that policy contained entire insurance contract and no change would be valid unless indorsed by executive officer of insurer, whether insurer sent letter changing due date for payment of premiums, and whether terms of letter were agreed to by insured, *held* for jury.

3. Insurance ⇐668(15)

In action on health and accident policy, whether insurer had waived forfeiture for nonpayment on due date by accepting premium payment after due date so that last premium sent twenty-three days after due date and day before insured's accidental death kept policy in operation at time of death *held* for jury.

4. Trial ⇐139(1), 191(1)

Instructions which assumed as facts controverted matters and requested directed verdicts for defendant in case raising fact questions *held* properly denied.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Preston Vinther and others against the Sunset Mutual Life Insurance Company. From an adverse judgment, the defendant appeals.

Affirmed.

Carlos S. Hardy, of Los Angeles, for appellant.

Eugene P. Fay, of Los Angeles, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ROTH, Justice pro tem.

Plaintiffs and respondents are the children of Claude A. Vinther, now deceased. Said deceased on December 11, 1930, entered into a contract with defendant, insuring himself against sickness and accident, in consideration for which policy of insurance, deceased paid quarterly premiums in a stipulated amount. The contract of insurance by its express terms provided that the next quarterly premium due immediately subsequent to the issuance of the contract was March 15, 1931, and was payable quarterly thereafter. Deceased was killed in an accident at Red Bluff, Cal., on July 9, 1933. On July 8, 1933, the day prior to his death, deceased had mailed to defendant from the postoffice at Proberta, Cal., the quarterly payment which had become due on June 15, 1933. From the date of the issuance of the policy until the final premium was paid, premiums became due and were paid as follows:

"Due date as fixed by policy	Date Paid	Days Late.
December 11, 1930	December 11, 1930	0
March 15, 1931	March 23, 1931	8
June 15, 1931	June 26, 1931	11
September 15, 1931	October 1, 1931	15
December 15, 1931	January 23, 1932	38
March 15, 1932	March 19, 1932	4
June 15, 1932	July 1, 1932	15
September 15, 1932	September 23, 1932	8
December 15, 1932	January 6, 1933	21
March 15, 1933	April 5, 1933	20
June 15, 1933	July 8, 1933	23"

It will be observed from the foregoing compilation that premium payments, with the exception of the first, were never made as required by the policy, but were made and accepted when overdue from four to thirty-eight days. The contract of insurance made no provision for a period of grace. The final payment was mailed on July 8, 1933, in the form of a money order. The money order was received by defendant on July 11, 1933. On July 12, 1933, one of defendant's officers wrote a letter to the insured with respect to the final delayed premium payment and the consequences of such delay, saying in part: "We are in receipt of money order for $12.00 to apply on the above numbered policy, which we are holding subject to your order and which we will return to you if for any reason you are not reinstated." According to the testimony adduced by defendant, this letter was sent to deceased prior to receipt on the same day of a letter dated July 10, 1933, from Wetter & Rankin, attorneys for plaintiffs, located at Red Bluff, Cal., advising defendant of the insured's death. The postmark on the letter from the attorneys showed that it had been mailed in Red Bluff at 9 p. m., July 10th. It was received by defendant at 2 p. m. on July 12th. Upon receipt of the Wetter & Rankin letter, defendant replied by mail under date of July 12, 1933, that the Vinther policy had lapsed for nonpayment of premium on July 1, 1933, and inclosed to the attorneys the money order which had been received from the insured on July 11, 1933, and defendant also stated, "In view of the circumstances, please disregard our letter which was mailed to Mr. Vinther earlier in the day regarding reinstatement." The money order mailed from Proberta, Cal., and referred to in the letter of defendant to deceased, which was allegedly written before receipt of the letter from the attorneys for plaintiffs, was introduced in evidence and showed an indorsement thereon made by defendant.

[1] Plaintiffs proceeded on the theory that prompt payment of quarterly premiums had been waived by the conduct of the defendant, and that by reason of said conduct, deceased had been given a reasonable time after due date of the premiums to make payment thereof. The case was tried before a jury, which brought in a verdict for the plaintiffs.

The primary question involved is, whether the facts detailed establish a waiver by the insurer of that clause in its contract of insurance requiring prompt payment. Nelson v. National Guaranty Life Co., 131 Cal. App. 669, 21 P.(2d) 1022 (hearing denied by Supreme Court), is directly in point. In the Nelson Case, speaking with reference to similar facts, the court said 131 Cal.App. 669 at page 672, 21 P.(2d) 1022, 1023: "Had defendant, by its course of dealing as shown from the facts stated, waived the forfeiture? The test should be, whether by such conduct the insured had been led to believe that payment made within a reasonable time after the 15th would be received in discharge of the installment and the policy would continue in force, and had acted accordingly, and that, until some notice was given, other and different and more specific than those referred to, the forfeiture would not be insisted upon.

"The theory of defendant is that as a matter of law the lapse under the contract was brought about by default of payment, and that subsequent receipt of the payment worked a reinstatement. The notices to some extent were worded to create that im-

pression. While the policy provided that, if a lapse occurred on the 15th, the contract was ended and reinstatement could only be had as provided in the policy, as quoted above, yet in the many lapses no reinstatement had been made as required by the policy. Of course, all these provisions are for the benefit of the company and can be waived by it, and the fair inference was that, as proof of health had never been required, the payments were being accepted as continuation of the policy and not reinstatement. Such understanding by the insured operated as a waiver of all the provisions relating to forfeiture until specific notice should be given.

"The contract, if those forfeiture provisions were waived, was in that class where nonpayment of an installment would not work a forfeiture, and where the law permits payments to be made until definite notice is given that failure so to do will work a forfeiture. The result of this course of reasoning would seem to be that this contract was in force at the time of death, whether the payment was in fact made or not."

Defendant sought to avert the effect of the evidence, which has been summarized, by attempting to prove that on February 27, 1931, it had by letter, with the terms of which deceased had acquiesced, changed the due date of premiums by advancing the date of payment thereof to April 1, 1931, and providing that thereafter premiums were to be paid quarterly on the first of the month for all quarters succeeding April 1, 1931. It is not contended that this letter was ever attached to the policy, or that an approval of the change was indorsed on the policy. The policy itself contained the following provisions:

"Standard Provisions. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. * * * 2. * * * No change in this policy shall be valid, unless approved by an executive officer of the Company, and such approval to be endorsed hereon."

[2-4] Whether or not the letter of February 27, 1931, which was not found among the effects of the insured, was actually sent, was a question of fact. Whether the terms thereof were ever agreed to by the insured, was also a question of fact. When considered in connection with the provisions of the policy itself and the admitted fact that the insured, in spite of said letter and shortly after the alleged transmittal thereof, did pay, on March 23, 1931, the premium according to the terms of the policy and not the letter, it cannot be said by this court that there was no substantial evidence to sustain the jury's implied finding that the letter was not sent and that, if sent, it was not acquiesced in by the insured. Conceding for the purposes of this case that, in spite of the provisions of the policy requiring indorsement thereon of any change, it could be changed by letter, it is clear on the facts of this case that, whether the letter was sent, and what the decedent did after receipt thereof, if it was sent, were questions of fact. The jury was justified in concluding from the facts that the terms of the policy with reference to payment date of premiums were not changed. Furthermore, as has been undoubtedly observed, even though defendant's theory as to the policy change by letter were adopted, the evidence shows that on three different occasions the defendant accepted late payments on its own theory of what the due date was, two of which were the quarterly payments immediately preceding the last one. Even under such comparatively limited circumstances, the doctrine announced in Nelson v. National Guaranty Life Co., supra, would apply, and, in our opinion, a court or jury upon evidence merely of the last two consecutive delinquencies without protest by defendant would be justified in finding a waiver of the prompt payment clause. We find no prejudicial error in the instructions given, or in the failure of the court to direct a verdict, or to give five of the instructions requested by the defendant. Each of such five instructions assumed as facts controverted matters and were, in fact, requests for a directed verdict in defendant's favor. Each was properly refused. Bellon v. Silver Gate Theatres, Inc. (Cal.Sup.) 47 P.(2d) 462, 469; Tucker v. San Francisco, 111 Cal.App 720, 296 P. 101.

The judgment is affirmed.

We concur: YORK, Acting P. J; DORAN, J.

LANGE et ux. v. CURTIN et al.

Civ. 9990.

District Court of Appeal, First District, Division 2, California.

Jan. 9, 1936.

Hearing Denied by Supreme Court March 9, 1936.

1. Appeal and error ⇐560

Appellant, claiming that there is no evidence to support finding, need not print evidence on irrelevant matters, and burden is on respondent, believing there is some evidence, to direct court's attention to such evidence.

2. Bills and notes ⇐525

Where defendant, before purchasing note, required verified statement from makers acknowledging execution of note, evidence *held* insufficient to sustain finding that defendant was not holder in due course (Code Civ.Proc. § 1963, subd. 19).

3. Bills and notes ⇐21

Where grantors authorized correction of defective description in trust deed, unauthorized forgery of new trust deed *held* not to affect note secured by defective deed (Civ.Code, § 3265).

4. Principal and agent ⇐150(1)

Generally, principal is bound by unauthorized acts of his agent through which innocent third party has sustained loss unless limitations of agency are known or can be readily ascertained.

5. Principal and agent ⇐147(1)

If principal's failure to limit agent's authority is due to principal's carelessness and results in loss to third party, statutory rule that where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be the sufferer applies (Civ. Code, § 3543).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by George J. C. Lange and wife against E. J. Curtin, doing business under the fictitious firm name and style of E. J. Curtin & Company, the Federal Finance Company, Incorporated, and the Union Bank & Trust Company of Los Angeles and others. From an adverse judgment, the Federal Finance Company, Incorporated, and the Union Bank & Trust Company of Los Angeles appeal.

Judgment reversed.

Rutan & Mize, of Santa Ana, and Earl E. Johnson and Arch H. Vernon, both of Los Angeles, for appellants.

Warren Lee Pierson and Dee Holder, both of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to rescind a promissory note and deed of trust and had judgment. The two corporate defendants alone appeal, but, since the Federal Finance Company is the real party in interest pressing the appeal, we will refer to it herein as the appellant.

On February 23, 1931, plaintiffs executed and delivered to defendant Curtin a promissory note in the sum of $12,000 secured by a deed of trust covering real property located in Glendora, Los Angeles county. After the deed was recorded, a mistake was discovered in the description of the property, and Curtin procured a forged deed covering the same property which he recorded. About the same time the original note was altered to read "March 2nd" instead of February 25th. Upon the recordation of this deed Curtin procured a certificate of title from a Los Angeles title company which he took to the office of the Finance Company, which was located in Santa Ana, Orange county. He there endeavored to sell the note, but was told that he would have to present further evidence of the validity of the documents. He returned with a written statement signed by both plaintiffs and herein called the "offset" statement. This document read in part: "We, Geo. J. C. Lange and Rose T. Lange hereby acknowledge the execution of one certain promissory note for the sum of $12,000.00, dated Los Angeles, California, March 2, 1931. * * * Said note secured by deed of trust duly executed by us and acknowledged, etc." The last paragraph, immediately above the signatures, read: "We jointly and severally, hereby acknowledge the execution and delivery of the above-mentioned note and deed of trust securing the same, and state that we have received full consideration therefor, and further state and represent that the said E. J. Curtin and his assigns are fully authorized and empowered to assign and convey said note and deed of trust to any persons whomsoever they may see fit."

When this document was presented to the Finance Company, it made further objection that the signatures should be verified, and Curtin undertook to have this done by the cashier of plaintiffs' bank in Glendora. The agent of the Finance Company made

arrangements to meet Curtin at that bank on the afternoon of March 9th. In the forenoon of that day Curtin delivered the paper to the cashier of the Glendora bank, who phoned Mrs. Lange and had her verify her signature. During the day Curtin and Mr. Lange called on the cashier and Mr. Lange then verified his signature. The cashier guaranteed both signatures, affixed his name and the seal of the bank, and then, in the presence of Mr. Lange, delivered the paper to Curtin. The latter immediately walked out of the bank, where he met the representative of the Finance Company to whom he delivered the off-set statement, the promissory note, and the certificate of title, and received in return the Finance Company's check for $11,000.

In explanation of some of the peculiar circumstances involved in these transactions, it should be stated here that the plaintiffs had absolute confidence in Curtin—they testified that they signed numerous papers at his request without reading them and without asking what they were. Mr. Lange owned some stock in an Arizona mining company in which Curtin was also interested. He testified that the original deed of trust and note were given Curtin to use as collateral in the purchase of more stock in the mining company and that they were delivered upon Curtin's representation that through the use of these papers he would obtain a profit from this stock of $8,000, which he agreed to pay to the plaintiffs. Curtin testified that no restrictions were placed upon his use of the papers except that he was to use them in manipulation of the mining stock and was to pay plaintiffs the profit therefrom. Concededly no restrictions were made in writing and, so far as appears from the promissory note, it was negotiable for all purposes. Color is given to Mr. Lange's testimony by reference to the offset agreement executed on March 9th where permission is there expressly given to assign and convey the note as Curtin desired.

[1] Attention should first be directed to the manner of presentation of the appeal. The appellant states that there is no evidence to support certain findings. It then cites evidence which it claims would demand findings contrary to those made. The respondents criticize the practice and insist that appellant should have printed all the evidence. They then cite authorities which they claim support that argument. We do not refer to these authorities except to say that none is in point. When the claim of the appellant is that there is no evidence to support a finding he is not required, by either Code section or rule of court, to print evidence on irrelevant matters. He is required to print the evidence which he desires to call to the attention of the court. If there is no evidence on a particular issue, there is nothing for him to print. Conversely, when the attack is made in this manner, and the respondent believes that there is some evidence, it is incumbent upon him to direct the court's attention to such evidence. Here respondents have followed the not unusual practice of demanding an affirmance because appellant failed to print the evidence. This practice requires the court to examine the entire transcript to see if any such evidence is there. We have made such an examination of this record and are satisfied that the judgment must be reversed because the evidence does not support material findings.

The fraud of Curtin in procuring the execution of the various documents is conceded by appellant. The respondents might have conceded that this appellant had no part in and no knowledge of any of these fraudulent acts as the evidence clearly demonstrates this to be the fact. The Finance Company defendant on the grounds that it was an innocent purchaser for value; that plaintiffs were estopped by the offset statement; and that the plaintiffs should suffer the loss under the doctrine of section 3543 of the Civil Code.

Directing our attention solely to the promissory note, we are unable to find that any of the elements are lacking which are necessary to make one a holder in due course under the provisions of section 3133 of the Civil Code. It is complete and regular upon its face, duly executed by the named payors and delivered by them to the named payee. Though an alteration was made as to the date of execution, an alteration favorable to the payors, this was assented to by the payors when they executed the offset statement in which they expressly affirmed their execution of the note as of the date to which it had been changed. Thus, so far as the note itself is concerned, the appellant may rest strictly on section 3205 of the Civil Code—either that the parties assented to the alteration, or that, as a holder in due course, it could enforce it according to its original tenor.

The appellant took the note before maturity and in good faith. In the first place,

the good faith is presumed. Section 1963, subd. 19, Code Civ.Proc. In the second place, there is not a word of evidence tending to rebut this presumption, but ample evidence to support it. Appellant paid $11,000 in cash for the note so the question of value cannot be controverted.

Then we have the element of notice. The trial court found that appellant took with full notice of all the infirmities. There is no evidence of any character supporting this finding. If the original fraud of Curtin in procuring the execution of the note be treated as one of the infirmities, it is conceded that appellant had no knowledge of that and no possible means of obtaining such knowledge. The respondents admit that they executed the note and delivered it to Curtin. If inquiry had been made of them at the time there is no ground for any assumption that they would have denied it. When appellant demanded and received the offset statement, it had the most effective assurance from the makers that the note was all that it purported to be and was free from any claimed infirmities.

We have referred generally to the offset statement in relation to the matter of alteration and notice of infirmities. Respondents meet appellant's attack by reference to the finding that appellant did not rely on this statement. Every word of evidence on the subject, and every inference which could be reasonably drawn therefrom, demands a finding to the contrary. Curtin was endeavoring to sell both the note and the deed of trust. The latter had been filed for record in the office of the Los Angeles county recorder and was not open to appellant for inspection. The note was regular on its face with the exception that the date of execution had been changed from February 25th to March 2d. Curtin tendered with the note a certificate of title issued by a title company of Los Angeles showing respondents' title to the property and the deed of trust dated March 2d. Whether it was because of the alteration of the note or because of the inability to examine the original deed of trust, the appellant refused to proceed with the purchase until it received the offset statement duly signed and verified by the makers of the note and which confirmed in writing both the note as altered and the deed as recorded. All the evidence was to the effect that the deal would not have been made except for this offset statement and that it was not made until this statement was delivered.

At this point we should refer to another finding of fact upon which respondents place much stress. This is the finding that the offset statement was not delivered. Every word of evidence is to the contrary. Mr. Lange testified that he met Curtin in the Glendora bank with the cashier; that Curtin asked him to verify his signature to the offset statement; that after he did so the cashier affixed the seal and handed the paper to Curtin in his presence. Curtin and the cashier gave the same testimony. Mrs. Lange testified that she verified her signature by telephone, called her husband to go to the bank for his verification and left everything to him. Both Curtin and the agent of appellant testified that the offset statement was delivered to the latter upon receipt of the check in payment for the note.

[2, 3] We refrain from discussing other attacks upon the findings because the opinion is already overlong. It is sufficient to say that the evidence is wholly insufficient to support the findings to the effect that appellant was not a holder in due course of the promissory note and that, for that reason, the judgment must be reversed. As it is impossible to confine the retrial to any particular issue, it should be said, in reference to the deed of trust, that under the circumstances presented here the note and deed are not to be treated as one instrument. The note was executed on February 25th and was secured by a valid deed of trust, except for the faulty description of the property. Respondents authorized Curtin to make correction of this defect and, without their knowledge, he forged a new deed of trust. Thus, though the forgery makes this deed of trust void from the beginning, it had no effect on the note which was executed and secured by the defective deed, neither of which was tainted with forgery. It would appear, therefore, that the negotiability of the note would not be affected by anything that was done in reference to these deeds of trust. Section 3265, Civ. Code.

For these reasons the new trial should recognize the distinction between the valid note and the forged deed. Whatever rights the appellant may have under the latter must depend upon the effect of the offset statement. In answer to appellant's claim of estoppel, the respondents rely upon the finding that the offset statement was procured by Curtin through fraud and that the respondents were without knowledge of

its contents. This finding of no estoppel is a mixed finding of law and fact and the conclusion that the respondents were not estopped is based largely upon the findings of fact relative to the promissory note which we have said are not supported by the evidence. Because of this situation, we make no comment upon the legal questions discussed by the parties relative to the elements necessary to constitute an estoppel of this character. If on a retrial the findings of fact are different, then those questions will answer themselves.

For like reasons we make no extended comment on the application of section 3543 of the Civil Code. Manifestly, if the court should find that both the appellant and the respondents were innocent parties and that the act happened through the negligence of the respondents, the judgment should go for the appellant. Respondents lay great stress on the finding that they were not negligent, while appellant argues from authorities cited that identical acts are negligent as a matter of law. Here again the finding is a mixed one of law and fact and the facts upon which appellant relies as proving the negligence of respondents are so closely interwoven with the facts included in the findings heretofore criticized that it would serve no purpose to discuss the legal questions involved until those facts are settled by appropriate findings

[4, 5] Appellant makes the further point that, since Curtin was the agent of the plaintiffs, their negligence, particularly in the execution of the offset statement, must follow as matter of law. There is no conflict in the evidence that plaintiffs made Curtin their agent to use the note and trust deed in the manipulation of the mining stock. Whether this agency was limited to the use of these papers as collateral, as plaintiffs testified, or was unlimited, as appellant contends, is immaterial. As a general rule the principal is bound by the unauthorized acts of his agent through which an innocent third party has sustained loss unless the limitations of the agency are known or can be readily ascertained. If the failure to limit is due to the carelessness of the principal, then the rule of section 3543 applies. Upon this theory, the appellant cites authorities holding that the failure of a party to read a document before signing it is negligence. Language supporting that argument is found in Gridley v. Tilson, 202 Cal. 748, 262 P. 322, but this is explained in Humphrey v. Harry H. Culver & Co., 220 Cal. 765, 32 P.(2d) 630, where it is said that the rule contended for is inapplicable where the failure to read is due to the trickery or fraud of the one procuring the signature. All the cases, however, recognize the distinction between this line of cases where the controversy is between the parties alone, and those cases where the controversy is between an innocent third party and the principal who has clothed his agent with apparent authority. In the latter instances the principal is held to a higher degree of care. This distinction should be borne in mind in the retrial because, though the trial court here found as a fact that plaintiffs were not negligent in the execution of the offset statement, a review of the evidence discloses that a contrary finding would have been fully supported. See Schultz v. McLean, 93 Cal. 329, 357, 28 P.(2d) 1053; Conklin v. Benson, 159 Cal. 785, 793, 116 P. 34, 36 L.R.A. (N.S.) 537; Shirey v. All Night and Day Bank, 166 Cal. 50, 55, 134 P. 1001; Fleming v. Dolfin, 214 Cal. 269, 4 P.(2d) 776, 78 A.L.R. 585; Smeade v. Rosen, 121 Cal. App. 79, 84, 8 P.(2d) 507.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 92

SUNSET SCAVENGER CORPORATION v. ODDOU.

Civ. 9543.

District Court of Appeal, First District, Division 1, California.

Jan. 3, 1936.

Rehearing Denied Feb. 1, 1936.

Hearing Denied by Supreme Court March 2, 1936.

1. Action ⇐6

Under statute authorizing actions for declaratory relief, court was authorized to determine whether covenant not to sue was valid or had been rescinded (Code Civ.Proc. § 1060).

2. Action ⇐6

Appeal and error ⇐949

Statute authorizing court to refuse to entertain action for declaratory relief where its determination is not necessary or proper invests trial court with discretionary power, and its refusal to entertain action is not

reviewable except for abuse of discretion (Code Civ.Proc. § 1061).

3. Appeal and error ⇐911(3)

Plaintiff appealing from adverse judgment in action for declaratory relief has duty to present record which shows that relief was improperly refused, and in absence of a showing to contrary, appellate court must assume trial court properly exercised its jurisdiction (Code Civ.Proc. §§ 1060, 1061).

4. Release ⇐7

Covenant not to sue a sole tort-feasor is, to avoid circuity of action, considered a "release" and may be so pleaded in action against such tort-feasor, but covenant not to sue one of several tort-feasors cannot be so pleaded by covenantee, who must seek his remedy in action for breach of covenant.

[Ed. Note.—For other definitions of "Release," see Words & Phrases.]

5. Release ⇐57(1)

In truck owner's action for declaratory judgment declaring its rights under covenant not to sue executed by street car passenger injured in collision between street car and truck, evidence *held* insufficient to show that street car company was joint tort-feasor, as respects availability of covenant as defense to passenger's negligence action and as ground for denial of declaratory relief (Code Civ.Proc. §§ 1060, 1061).

6. Release ⇐7

Where covenant not to sue executed to truck owner by street car passenger injured in collision between street car and truck was available as complete defense in passenger's negligence action against truck owner, owner *held* not entitled to declaratory judgment establishing validity of covenant and enjoining passenger from asserting its invalidity (Code Civ.Proc. §§ 1060, 1061).

7. Action ⇐6

In action by truck owner against injured party for declaratory judgment as to owner's rights under party's covenant not to sue, court could not grant injunction restraining covenantor from breaching covenant, since purpose of declaratory judgment is merely to declare rights and not to execute them (Code Civ.Proc. § 1060).

8. Injunction ⇐118(4)

Allegations of truck owner suing injured party for declaratory judgment as to owner's rights under party's covenant not to sue that action on covenant was inadequate remedy because owner would first have to defend injured party's negligence action and satisfy any judgment *held* insufficient to justify enjoining breach of covenant, even if injunction ancillary to declaratory judgment were proper (Code Civ.Proc. § 1060).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action for declaratory relief by the Sunset Scavenger Corporation against Florence Oddou. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

George K. Ford, of San Francisco, and Francis N. Foley, of San Mateo, for respondent.

GRAY, Justice pro tem.

Plaintiff sued for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure but was denied such relief under the provisions of section 1061 of the same Code. This appeal questions the propriety of the court's refusal to grant the requested relief. The issues and facts are few and simple as will appear from the following synopsis of the pleadings and evidence.

The complaint alleged that defendant was injured in a collision between a street car and an autotruck owned and operated by plaintiff; that, in consideration of $320.75 paid, defendant executed the covenant not to sue, attached as an exhibit; that such covenant remains in full force and effect; that defendant had served upon plaintiff a notice of rescission and has ever since claimed that such covenant has been rescinded; that the grounds of rescission were mistake, undue influence, duress, menace, and fraud, but that such covenant was entered into without the existence of any of such grounds; and that plaintiff desires a declaration of its rights under the covenant and brings the action for such purpose. The prayer asked a judgment declaring plaintiff's rights under the covenant, establishing its validity and enjoining defendant from asserting its invalidity. The answer merely denied that the covenant was ever valid or of any force or effect or that the grounds of rescission were limited to those stated in the complaint. By way of an affirmative defense, it alleged that previously defendant had filed a complaint to recover damages for injuries sustained in the collision; that previously de-

fendant had filed an answer thereto; that plaintiff, although it had an opportunity so to do, had failed to plead the covenant as a defense; that the declaration prayed was not necessary or proper; and that the covenant constituted a defense and counterclaim, existing at the time of filing its answer, which was waived by failure to plead.

At the trial, plaintiff introduced into evidence the covenant not to sue, and the complaint and answer in the negligence case, referred to in the present answer, and then rested. Defendant offered no evidence. The complaint for damages charged that the present plaintiff and its employee so negligently operated its autotruck as to cause it to collide with a street car upon which the present defendant was riding as a passenger, thereby inflicting upon her specified injuries to her damage in stated sums. Plaintiff's answer thereto denied negligence, injuries, and damages and affirmatively pleaded contributory negligence. The court found that defendant had been injured in the collision; that for the consideration of $320.75 she had executed the covenant pleaded; that she had served notice of rescission, set forth in hæc verba; and that she had commenced the action to recover damages from plaintiff and its employee. It further found "that a declaration or determination of rights under and with reference to said covenant not to sue is not necessary or proper under all of the circumstances." Judgment in favor of defendant was entered accordingly.

[1-3] Said section 1060 provides in part as follows: "Any person interested * * * under a contract * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action * * * for a declaration of his rights and duties in the premises, including a determination of any question of * * * validity arising under such * * * contract." Under this section the court was authorized to determine whether the covenant was valid or had been rescinded (Frasch v. London & Lancashire F. Ins. Co., 213 Cal. 219, 2 P.(2d) 147), but this it refused to do. Said section 1061 reads as follows: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." This section invests the trial court with discretionary power in entertaining an action for declaratory relief and its refusal so to do is not reviewable upon appeal, except for abuse of discretion. Cutting v. Bryan, 206 Cal. 254, 274 P. 326. The court is not required to speculate as to matters not presented by the pleadings or the evidence. It is the duty of the appellant to present a record which shows that relief was improperly refused, and, in the absence of a showing to the contrary, the appellate court must assume that the trial court properly exercised its discretion. Bard v. Standard Mortgage Corp., 119 Cal.App. 509, 6 P. (2d) 582. "A suit for a declaratory judgment is a discretionary remedy (Civil Practice Act, § 473), which may be withheld if existing forms of action are reasonably adequate." Newburger v. Lubell, 257 N.Y. 383, 178 N.E. 669. If the covenant could have been pleaded as a defense in the negligence action, the court properly refused to exercise its power of declaratory relief. Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 22 P.(2d) 529. Of, if plaintiff had a speedy and adequate remedy in an action on the covenant in which the questions of validity and rescission could have been determined, the court had discretion to refuse to accept jurisdiction on the ground it was unnecessary. Stenzel v. Kronick, 102 Cal.App. 507, 283 P. 93. The province of a declaratory judgment does not include the declaration of remedies available to the plaintiff for the assertion of his rights as declared. Bartlett v. Lily Dale Assembly, 139 Misc. 338, 249 N.Y.S. 482. A declaratory judgment is not a proper mode of determining the sufficiency of legal defenses to a pending action. Slowmach Realty Corporation v. Leopold, 236 App.Div. 330, 258 N.Y.S. 500.

[4-6] A discussion of the wording of the agreement executed by the defendant is unnecessary, for admittedly it was correctly designated by the parties in their pleadings as a covenant not to sue. A covenant not to sue a sole tort-feasor is, to avoid circuity of action, considered in law a release and may be so pleaded in an action against such tort-feasor. But a covenant not to sue one of several tort-feasors cannot be so pleaded by the covenantee, who must seek his remedy in an action for breach of the covenant. Matthey v. Gally, 4 Cal. 62, 60 Am. Dec. 595; Hawber v. Raley, 92 Cal.App. 701, 268 P. 943. The parties differ as to which of these two alternative rules is here applicable, the defendant claiming the first upon the argument that plaintiff was the sole tort-feasor involved in the collision, and plaintiff contending for the second upon the theory that the street car company was also

responsible for the collision. Neither party offered any direct evidence at the trial as to the happening of the accident, so it was impossible therefrom to determine the street car company's negligence. An inference of such negligence might have been drawn from the fact that defendant was its passenger at the time of the collision, but such inference could have been dispelled by proof as to the manner in which the collision occurred. 4 Cal.Jur. 990. However, the failure of her complaint to charge the street car company with negligence clearly negatives any claim on defendant's part that its negligence contributed to her injuries. The assertion in her present answer that the covenant could have been pleaded as a defense in the negligence action necessarily implies that she did not claim that the street car company was liable. The covenant would estop plaintiff and defendant from denying the former's liability (Hawber v. Raley, supra), but would not affect the assertion or denial of the street car company's liability. The evidence in the present case does not show that the street car company was a joint tort-feasor, and if it were not, the covenant was a complete defense in the negligence case. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869.

[7, 8] Plaintiff argues that an action on the covenant does not provide it with a speedy and adequate remedy, because it would be required, prior to bringing such action, to expend attorney's fees and costs in defense of the negligence case and to satisfy any judgment recovered therein. Hence it strenuously contends that it was entitled to an injunction restraining defendant from breaching the covenant not to sue. This contention is based upon a misconception of the nature and purpose of a declaratory judgment. Its purpose is to declare rights rather than to execute them. Aetna Life Ins. Co. v. Richmond, 107 Conn. 117, 139 A. 702. Such a proceeding can only be invoked to declare rights and not to determine or try issues. Loomis Fruit Growers' Ass'n v. California F. Exch., 128 Cal.App. 265, 281, 16 P.(2d) 1040. It would have been error for the trial court to have attempted to give to its determination any other or further effect than that of a declaratory judgment. City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 151, 287 P. 475. Conceding that an injunction ancillary to a declaratory judgment might be proper under some circumstances (James v. Hall, 88 Cal. App. 528, 264 P. 516), still its issuance should be governed by those considerations which generally control the granting of injunctions. The complaint is utterly devoid of any allegation of those equitable grounds essential to an invocation of this summary, peculiar, and extraordinary remedy. 14 Cal.Jur. 261. The evidence suffers the same deficiency.

It appearing, therefore, that the trial court properly exercised its discretion in denying declaratory relief, the judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, Acting P. J.



11 Cal.App.2d 154

LOPEZ v. RICHARD et al.

Civ. 1581.

District Court of Appeal, Fourth District, California.

Jan. 8, 1936.

1. Evidence ⇐376(12)

Partnership books *held* admissible on testimony of one partner that he kept books for partnership with consent of other partner and that books were used by both, notwithstanding that other partner testified that books introduced constituted private account of partner who kept them and that real partnership account had been lost.

2. Partnership ⇐217(3)

In action against individual partners and partnership for services rendered and seed furnished in farming operations for partnership, evidence *held* to support judgment for plaintiff based on finding that seed and services were furnished to partnership.

Appeal from Superior Court, Orange County; H. C. Ames, Judge.

Action by Lusia Lopez against M. Richard, also known as Marcel Richard, and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Ezra E. Stern and Michael M. Moser, both of Los Angeles, for appellant.

Ray H. Overacker, of Huntington Beach, for respondent.

BARNARD, Presiding Justice.

This action was brought to recover for certain seed used by the defendants as copartners and for certain services performed for the partnership by Leon Lopez, both of these claims having been assigned to the plaintiff. It fully appears that the defendants, as copartners, were carrying on certain farming operations during the year 1932, and it is not disputed that the seed was furnished and the work was done in connection therewith. The defendant Richard maintains, however, that under their agreement his partner was to furnish the seed. He further maintains that Julian Lopez had agreed to contribute his own work to the enterprise, that in lieu thereof he employed his nephew, Leon Lopez, to do the work in his stead, and that he, Richard, is in no way obligated for the wages due to Leon Lopez. The defendant Julian Lopez failed to answer and the action was defended by Richard alone. The court found in all respects in favor of the plaintiff, and from the judgment entered against both partners, the defendant Richard has appealed.

[1, 2] The appellant contends that the court erred in receiving into evidence an account of the partnership transactions kept by the defendant Julian Lopez, that aside from this account there is no evidence worthy of belief which supports the findings to the effect that the seed and services in question were ordered by and furnished to the copartners, and that there is, therefore, no evidence to support the findings and judgment. In effect, it is maintained that the court should have believed the appellant's testimony from which it would appear that his partner was alone obligated with respect to the two items in question.

Julian Lopez testified that he kept this account of the partnership transactions with the amounts owed, including the items in question; that he was asked to do this by the appellant; that the appellant knew he was doing this and frequently looked over the book; and that both used the book whenever one of the men was to be paid. While the appellant maintains that this was a private account kept by his partner, Julian Lopez, and while he testified that he himself kept the real partnership account, which he said had disappeared and which was not produced, the conflict thus raised was for the trial court and, in so far as anything here raised is concerned, the account in question was properly admitted in evidence. Shepard v. Yale, 94 Cal.App. 104, 270 P. 742.

In addition to the account which was introduced in evidence, Julian Lopez testified that he bought the seed for the copartnership, used it in their business, and agreed that they would pay for it, and that he employed Leon Lopez to render these services for the copartnership and agreed that they would pay him as soon as the money came in from the crop. He further testified as to the quantity of seed furnished, the amount of work done, and the prices agreed to be paid therefor. There was some evidence that the appellant agreed to pay the amount allowed by the court for the seed and that he made one payment on the wages due to Leon Lopez.

The evidence, although conflicting, is sufficient to support the findings and judgment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 86

In re GRISWOLD'S ESTATE.

Civ. 5389.

District Court of Appeal, Third District, California.

Dec. 31, 1935.

1. Escheat ⇐6

Judicial proceeding and judgment in favor of state are necessary before escheat is accomplished (Code Civ.Proc. §§ 1272, 1274a, 1696).

2. Escheat ⇐6

Money bequest for which no claim was made by distributees within five years after deposit in county treasury *held* not escheated to state so as to bar subsequent claim by distributees where no escheat proceeding had been filed on behalf of state (Code Civ.Proc. §§ 1272, 1274a, 1696).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings in the matter of the estate of Margaret E. Griswold, deceased, by Adda Frances Forster and others against

Ray L. Riley, controller of the state of California, and another. Judgment for petitioners, and the respondents appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Lionel Browne and Albert F. Zangerle, Deputy Attys. Gen., for appellants.

W. A. Brandenburger and Ralph H. Lewis, both of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Margaret E. Griswold died testate on the 6th day of August, 1916, in the county of Los Angeles, leaving estate therein. Her last will was admitted to probate and distribution ordered in accordance with the terms thereof.

One of the provisions of the decree read, "$500.00 to be distributed to the heirs of Albert A. Forrester, deceased, who Chas. M. Lumereau raised as a child, Lindsay, California."

Thereafter the executor of the will, unable to ascertain who were the parties intended to be the recipients of the foregoing bequest, deposited the sum of $500 with the county treasurer of the county of Los Angeles, who thereafter on the 22d day of December, 1922, paid it over to the state of California, where ever since said sum has remained.

By proper proceedings initiated in April, 1933, it has been ascertained that the persons intended to receive said bequests are the petitioners herein, and a judgment was made and entered directing that the controller of the state of California draw warrants on the treasury of the state of California in favor of petitioners for the respective amounts due them.

[1, 2] From this judgment, the controller and treasurer have appealed, claiming that a person identified in a decree of distribution and entitled to a devise or bequest must claim the same within five years from the date of the deposit of such money in the state treasury, otherwise it shall become the property of the state by escheat. In other words, the state contends that all that is required under section 1274a of the Code of Civil Procedure in order that it may be determined that the state is entitled to the property, is: Was certain moneys deposited to the credit of an identified distributee in a county treasury and hence forwarded to the state treasury? And, did it remain there for five years without being claimed by the persons identified in the decree of distribution? This contention of the Attorney General is answered, and we believe successfully, by the respondent herein.

The subject of escheated estates is dealt with in part 3, title 8 of the Code of Civil Procedure (section 1269 et seq.). Section 1272 thereof provides that within five years after judgment in any proceeding had under this title, a person may file a petition in the proper court showing his right to the property, and upon failure to so appear, is forever barred. The contention has been made in previous actions that lapse of time alone creates an escheat, but the courts have held that there must be a judicial proceeding and judgment in favor of the state before an escheat is accomplished. 10 Cal. Jur. 569. In Re Estate of Miner, 143 Cal. 194, 76 P. 968, 971, this doctrine was sought to be applied to the language of section 1386 of the Civil Code, reading, "If * * * there are no heirs to take his estate, * * * the same escheats to the state." The court said, however: "It seems very clear that, in every case of a failure of succession for want of heirs or kindred of the decedent, an action of escheat becomes necessary to vest the title in the state."

This construction was again attempted to be applied in the interpretation of the language used in the statutes (see Code Civ. Proc. § 1273) relating to dormant bank accounts, wherein "all moneys deposited in any bank * * * unclaimed for twenty years * * * shall escheat to the state." In the case of Mathews v. Savings Union Bank & Trust Co., 43 Cal.App. 45, 184 P. 418, 420, the court said: "A construction of section 1273 of the Code of Civil Procedure and section 15 of the Bank Act by which title to money on deposit would pass to the state absolutely on the expiration of 20 years, without compensation to the owner and without notice and hearing before his property should be taken, would be intolerable. * * * So careful is the state of the rights of its citizens that even after the adjudication, for a period of 5 years, any person not a party or a privy to the escheat judgment may sue the state to recover the money."

In State v. Savings Union Bank & Trust Co., 186 Cal. 294, 199 P. 26, 28, the court said, in considering a claim to escheat certain bank deposits: "The precise claim of the state is that the declaration in section 1273 that the money which has remained on deposit 20 years under the conditions therein stated 'shall, with the increase and pro-

ceeds thereof, escheat to the state,' accomplishes an instantaneous escheat. * * * There is some conflict of authority on this question, some states holding to the doctrine that title to an escheat vests immediately in the state upon the happening of the act which causes it * * * but in this state * * * the other doctrine is followed."

The court also held in this case that any other procedure would be a violation of the "due process clause" of our Constitution.

Appellants argue that sections 1274a and 1696 of the Code of Civil Procedure prescribe the procedure for the recovery of unclaimed property in an estate. Section 1274a, however, provides that the Attorney General shall file an action in escheat and after the obtaining of such judgment the party entitled to the escheated property shall have five years after such judgment to claim the same. No proceeding in escheat having been filed, it is then apparent that section 1272 of the Code of Civil Procedure is applicable.

The judgment appealed from should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



11 Cal.App.2d 208

PEOPLE v. LERNER et al.

Cr. 2821.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1936.

Hearing Denied by Supreme Court Feb. 13, 1936.

1. Criminal law ⇐1037(2)

Misconduct of district attorney would not be considered where defendants did not assign any of alleged prejudicial remarks as misconduct at trial and did not request court to admonish jury in regard to such remarks.

2. Criminal law ⇐1170½(2)

District attorney's asking defendant whether he had ever been convicted of felony *held* not prejudicial where defendant answered in negative.

3. Criminal law ⇐911

Motion for new trial is addressed to sound legal discretion of trial court.

4. Criminal law ⇐1156(1)

Ruling on motion for new trial will not be disturbed in absence of abuse of discretion.

5. Criminal law ⇐942(2)

Proposal of witness to change testimony *held* not "newly discovered evidence" warranting new trial.

[Ed. Note.—For other definitions of "Newly Discovered Evidence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

William Lerner and Antonio Russo and others were convicted of second-degree robbery, and the named defendants appeal.

Affirmed.

John F. Groene, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Defendants Lerner and Russo (appellants) together with defendants Traney and Criswell were charged with robbery and were convicted of robbery in the second degree. This is an appeal from the judgments and the orders denying motions for new trial.

Appellants first contend there is an insufficiency of evidence to sustain the judgments against them. We find, however, that there is substantial evidence to sustain the judgments against each of them. It would serve no useful purpose to set out in detail the evidence upon which we rely. Koeberle v. Hotchkiss (Cal.App.) 48 P.(2d) 104; People v. Groves (Cal.App.) 50 P.(2d) 813. Appellant Russo also contends that the court erred in refusing to grant his motion for an instructed verdict, but this falls with our determination of his first contention.

[1, 2] Appellants next contend that the judgments should be reversed because of misconduct of the district attorney. In reviewing the record, we find no conduct of the district attorney which would warrant a reversal. Furthermore, not one of the remarks of the district attorney now claimed to be prejudicial was assigned by the defendants as misconduct at the time of the trial, neither was the court requested to admonish the jury to disregard such remarks. People v. Vickroy, 41 Cal.App.

275, 182 P. 764. Appellant Russo was asked whether he had ever been convicted of a felony. The question was answered in the negative and the matter went no further. People v. Majoine, 144 Cal. 303, 77 P. 952. There is nothing in the record to indicate that the question was not asked in good faith by the prosecutor.

[3-5] Appellants' final contention is that the court erred in denying the motions of appellants to set aside and vacate the judgments upon the ground of newly discovered evidence. This so-called newly discovered evidence was an alleged confession of the defendant Traney, assuming all guilt to himself and exonerating the other defendants. This confession was diametrically opposed to the testimony given by Traney at the trial. It was not in a proper sense newly discovered evidence, but was merely a proposal on the part of one of the witnesses to change his testimony, made after a fair trial and verdict rendered. The motion for a new trial was addressed to the sound legal discretion of the trial court and its ruling thereon will not be disturbed upon appeal unless its discretion has been abused. This rule is peculiarly applicable to rulings on motions for new trial based upon the ground of newly discovered evidence, because of the disfavor with which such applications have always been regarded. 8 Cal. Jur. 442.

Judgments and orders affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



11 Cal.App.2d 106

McPHEETERS v. BATEMAN et al.

Civ. 10204.

District Court of Appeal, Second District, Division 1, California.

Jan. 4, 1936.

1. Malicious prosecution ⇐15

Want of probable cause is essential element of malicious prosecution.

2. Execution ⇐472

Finding that levy of execution was caused to be made through malicious motives is not sufficient to support award of exemplary damages in absence of finding that levy was made also without probable cause.

3. Execution ⇐472

In action for damages caused by wrongful execution, award of exemplary damages *held* error where want of probable cause was not alleged or proved and finding of malice was not sustained by evidence.

4. Execution ⇐464, 472

Where execution is levied on property not belonging to judgment debtor, owner is entitled to recover from those responsible for levy, damage suffered by levy, and any further proceedings taken thereunder, and he sues for trespass to property and not for malicious prosecution, unless he also seeks to charge wrongdoers with exemplary damages.

5. Execution ⇐472

As respects liability for wrongful execution, where constable's instructions authorized him to take possession of all personalty belonging to business, which would include supplies on hand as well as equipment, creditor was responsible for levy on perishable property which spoiled.

6. Execution ⇐472

In action for damages caused by levy of execution against restaurant not belonging to judgment debtor, damages for loss of personalty levied on and loss of profits while business was closed *held* recoverable, even though levy was made without malice.

7. Costs ⇐238(2)

Plaintiff was entitled to recover costs of appeal in action for wrongful execution, on which award of exemplary damages was reversed because want of probable cause was not alleged or proved and finding of malice was not sustained by evidence, where demurrers to amended complaint were filed and withdrawn and no motion for new trial was made, since if points had been presented to trial court, appeal might have been obviated.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by J. C. McPheeters against Alynette Bateman, also known as A. Bateman, doing business under the name of the Medico-Dental Adjustment Bureau, and others. From a judgment for plaintiff, named defendant appeals.

Modified and affirmed.

M. R. Van Wormer, of San Luis Obispo, for appellant.

W. J. Minville, of San Luis Obispo, for respondent.

SHINN, Justice pro tem.

This is an appeal by defendant Alynette Bateman from a judgment for damages caused by the levy of an execution upon the property of plaintiff herein, who was not the judgment debtor. The only question involved is the sufficiency of the evidence to support findings as to various items of damage making up the total sum of the judgment for $127.

McPheeters owned a restaurant in San Luis Obispo. One Tucker, the judgment debtor, had been in complete charge thereof for more than a year, during which time McPheeters remained in Long Beach. The constable levied an execution at the instance of appellant, Bateman, under a judgment she held against Tucker. The instruction to the constable was to levy upon "the eating place known as the Hamburger Orchard, located on Morro street, with all equipment therein." The place was locked up for five days. Actual damages were awarded against appellant in the sum of $40 for loss of profits while the business was closed, the sum of $25 for food in the building which spoiled, and for $12 which had been paid for meat which had to be destroyed because it could not be used. Upon a finding that the defendant Bateman was actuated by malice in causing the levy of the execution, judgment went against her for the additional sum of $50 as exemplary damages. Judgment went in favor of her codefendant, the constable.

[1] The complaint does not allege nor does the evidence show want of probable cause for levying the writ. There is no finding one way or the other on that matter. Want of probable cause is an essential element of malicious prosecution. 16 Cal.Jur. 737. The same rule applies to ancillary writs, such as the writ of attachment [Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541; King v. Montgomery, 50 Cal. 115; Gonzales v. Cobliner, 68 Cal. 151, 8 P. 697]; the writ of injunction (Robinson v. Kellum, 6 Cal. 399; Asevado v. Orr, 100 Cal. 293, 34 P. 777); or an order appointing a receiver [Jones v. Richardson (Cal.App.) 50 P.(2d) 810].

[2] Proceedings had under a writ of execution, issued upon a judgment, are but steps taken in the prosecution of a civil action. The writ of execution is not to be distinguished from other writs which are afforded litigants and which may be availed of without punitive liability upon the part of those who act upon sufficient cause and from proper motives. If the element of either probable cause or malice is absent, the levy of the writ should not subject the judgment creditor to damages for malicious prosecution. The finding that the levy was caused to be made through malicious motives is not sufficient to support the award of exemplary damages in the absence of a finding that the levy was made also without probable cause.

[3] However, we have reviewed the evidence and find the case to present a common situation where a creditor has made a levy upon property, ostensibly owned by the debtor, and in a bona fide attempt to collect a just debt. There is nothing in defendant's conduct indicative of an intent to oppress or harass the plaintiff. The evidence is wholly insufficient to show malice. The award of exemplary damages was erroneous because want of probable cause was not alleged or proved and the finding of malice is not sustained by the evidence.

The case was tried and it has been briefed upon appeal under the theory that it is essentially an action for malicious prosecution. This is correct only to the extent that the questions of malice and want of probable cause are related to the matter of exemplary damages.

[4-6] Where an execution is levied upon property which does not belong to the judgment debtor, the owner of the property is entitled to recover from those responsible for the levy such damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. He sues for trespass to the property and not for malicious prosecution, unless he also seeks to charge the wrongdoers with exemplary damages. Nightingale v. Scannell, 18 Cal. 315; McDougald v. Dougherty, 12 Ga. 613; Brink's Chicago City Express Co. v. Hunter, 156 Ill.App. 537; Quackenbush v. Shively, 39 N.D. 156, 167 N.W. 387; Pinkard v. Willis (on rehearing), 24 Tex.Civ.App. 69, 57 S. W. 891. The court found, upon sufficient evidence, that plaintiff owned the property. The instructions to the constable were sufficient to authorize him to take possession of all of the personal property belonging to the business, which would include the

supplies on hand, as well as the equipment. Appellant is therefore responsible for the levy upon the perishable property which became spoiled and valueless. We are of the opinion that there was sufficient evidence to support the findings as to the amount of damages suffered by reason of the loss of the personal property, $37, and the loss of profits while the business was closed, for which the court allowed $40. These damages were recoverable even though the levy was made upon sufficient cause and without malice, and this part of the judgment should be affirmed.

[7] The sufficiency of the amended complaint to sustain a judgment for exemplary damages could have been tested on demurrer. The same point and the additional points that there was no sufficient evidence of malice or want of probable cause, and no finding of want of probable cause, could have been presented to the trial court on motion for a new trial. Demurrers to the amended complaint were filed and withdrawn and no motion for new trial was made. If these points had been presented to the trial court, this appeal might have been obviated. Under these circumstances, respondent and not appellant should recover costs of appeal.

The judgment is modified by eliminating therefrom the award of exemplary damages in the sum of $50 and is affirmed as modified; respondent to recover costs of appeal.

We concur: HOUSER, P. J.; DORAN, J.



11 Cal.App.2d 110

SACRAMENTO COUNTY et al. v. STEPHENS, County Auditor.

Civ. 5561.

District Court of Appeal, Third District, California.

Jan. 4, 1936.

1. Schools and school districts ⇐97(4)

Failure to subdivide school district into precincts and to designate more than one polling place for bond election *held* not to invalidate bonds voted at such election, notwithstanding district was composed of parts of two counties (School Code, §§ 2.81, 2.870, 2.875, and § 2.878, as amended by St.1931, p. 2294; §§ 4.960, 4.961 to 4.963 as added by St. 1931, pp. 718, 719, § 4.982, as added by St. 1931, p. 1939).

2. Schools and school districts ⇐97(4)

Publication in only one county newspaper of notice of bond election in school district composed of parts of two counties *held* compliance with statute and to validate bonds especially where election otherwise complied with statutes, and every qualified voter in district was fully informed of time, place, and purpose of election (School Code, §§ 2.81, 2.870, 2.875, and § 2.878, as amended by St.1931, p. 2294; §§ 4.960, 4.961 to 4.963 as added by St. 1931, pp. 718, 719, § 4.982, as added by St. 1931, p. 1939).

3. Schools and school districts ⇐97(4)

Statutory requirement that notice of bond election in school district must be published in newspaper of general circulation in any county in which any part of district is situated contemplates publishing of notice in only one newspaper and does not require publishing of notice in each newspaper of two or more counties, portions of which may constitute joint school district (School Code, §§ 4.961 to 4.963, as added by St.1931, p. 719).

4. Schools and school districts ⇐97(4)

Even if statutory requirement that notice of bond election in school district must be published in newspaper of general circulation in any county in which any part of district is situated means that notice of election should have been published in newspapers of counties comprising school district, failure to publish official notice thereof in more than one county paper did not invalidate bonds voted at such election, since publication and posting of notices of election are directory and not mandatory (School Code, §§ 4.961 to 4.963, as added by St.1931, p. 719).

5. Schools and school districts ⇐97(4)

Statutes providing for notices of bond election are mandatory when applied to situation existing prior to election, but such statutes are construed as directory in action to invalidate bonds after election in absence of statutory declaration that election will be invalidated for failure to strictly pursue statute (School Code, §§ 4.961 to 4.963, as added by St.1931, p. 719).

6. Schools and school districts ⇐97(4)

After school district bond election has been held and carried in substantial compliance with statute, slight irregularities which do not affect substantial rights of taxpayers of such district should be disregarded (School Code, § 4.982, as added by St.1931, p. 1939).

7. Schools and school districts ⇐97(4)

Whether bond election in school district is invalid because of insufficiency of statutory notice depends on whether voters had knowledge of election and whether result of election would have been different had statutory notice been given (School Code, §§ 4.961 to 4.963, as added by St.1931, p. 719).

Original mandamus proceeding by the County of Sacramento, the County of Placer, and Dry Creek Joint Elementary School District against William R. Stephens, county auditor of the county of Placer.

Writ granted.

Otis D. Babcock, Dist. Atty., of Sacramento, for petitioners.

Lowell L. Sparks, Dist. Atty., of Auburn, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a peremptory writ of mandamus to compel the auditor of Placer county to issue school bonds in the sum of $6,500, which were voted by the electors of the Dry Creek Joint Elementary School District at a bond election which was held therein pursuant to law. This proceeding was instituted to determine the validity of the bonds. The respondent contends that the bonds are void on account of the failure of the trustees of the district to segregate the district into precincts for the purpose of election and because notice of the election was not published as required by section 4.961, School Code, as added by St. 1931, p. 719, in a Sacramento county newspaper in addition to the one which was published in a Placer county newspaper, since portions of both counties are included in the school district.

This proceeding involves the following stipulated facts: Dry Creek Joint Elementary School District was organized pursuant to law. It has existed since 1857 and includes territory belonging to both contiguous counties of Placer and Sacramento outside of any incorporated city therein. The school building in question is now and always has been situated in that portion of the joint district within the county of Placer, where the greater number of pupils reside. Under the provisions of section 2.81 of the School Code, jurisdiction of the school district is conferred upon the county superintendent of the county where the greater number of pupils reside. The two school buildings which are located therein are old, delapidated, unsanitary, and unfit for educational purposes of the district. On June 20, 1934, they were condemned as unfit and unsafe for school purposes. At a regular meeting of the board of trustees of that district called for that purpose, pursuant to law, the trustees unanimously voted to hold an election therein pursuant to section 4.960 of the School Code, as added by St. 1931, p. 718, on March 21, 1935, to authorize the issuing of bonds in the sum of $6,500 for the construction of new school buildings and to improve the grounds and furnish necessary equipment therefor. Pursuant to section 4.963 of the School Code, as added by St. 1931, p. 719, which requires a bond election to be conducted in the same manner as an election for school trustees, the board duly designated the district schoolhouse as the place where the bond election was to be held pursuant to section 2.870 of the same Code, and directed that the election be held in the joint district as a whole constituting but one precinct thereof. Notices of the time and place of election together with a copy of the architect's sketches of the proposed school building and a statement of the maximum tax rate required to construct and furnish the same were personally delivered to each registered voter of the district or left for them at their residence prior to the election day. Official notices of the time and place of holding the election, signed by all of the trustees, were posted in three public places within the district in both Sacramento and Placer counties, for more than twenty days prior to the election as provided by section 4.961 of the School Code. An official notice of the time and place of the election was also published in conformity with the last-mentioned section of the Code in the "Roseville Tribune and Register," a newspaper of general circulation printed and published at Roseville in Placer county. Notices of the time, place, and purpose of the school bond election were repeatedly printed as matters of news in both the "Roseville Tribune and Register," and in the "Sacramento Bee" prior to the election, the last-mentioned newspaper having a wide circulation among the electors of the school district

in both counties. The necessity and proposal to submit the question of constructing and equipping new schoolhouse buildings were widely discussed among the electors of that district prior to the election. All school elections of that district had invariably been held in the school building which was designated as the place for holding this bond election since its organization as a school district. The election was conducted in every respect as required by statute. Prior to the election certified copies of the register of qualified electors in the school district in both Sacramento and Placer counties were procured from the respective county clerks pursuant to section 2.878 of the School Code, as amended by St. 1931, p. 2294, showing the names of all electors who were entitled to vote at the school election. All of the qualified electors residing in that portion of the school district which is located in Sacramento county voted at the school election with the exception of four individuals. Unusual interest was exhibited by the electors in the bond election, and an unusually large vote was cast thereat, being nearly four times as large as the vote cast for trustees of that district at the following election therefor. There is no evidence that any elector in the district was ignorant of the time or place of the election, and no elector was precluded from voting thereat. The bond election was carried by more than two-thirds majority of all electors voting thereat. If the four persons residing in the Sacramento portion of the district who failed to vote at the bond election were also counted as voting against the bonds, there would still be a majority in favor of the bonds in excess of two-thirds of all the qualified electors who participated in the election. It does not appear that the substantial rights of any taxpayer of the school district were injuriously affected by the failure to officially publish the notice of election in a Sacramento county newspaper. The election returns were regularly canvassed pursuant to law and the bonds were declared to have been carried by a two-thirds majority. Owing to the alleged defect of publication of notice, the auditor refused to issue or certify the bonds or offer them for sale as required by law. This petition for a writ of mandamus was brought to validate the bonds and to compel the respondent to issue and certify the bonds as valid obligations of the school district.

The respondent asserts that the bonds are void for the reasons that the entire school district was designated as one precinct for the purpose of the bond election, with the polling place at the schoolhouse building in Placer county, and that no separate precinct or polling place was designated for that portion of the district which is located in Sacramento county, and that the trustees failed to separately publish a notice of the time and place of holding the election in a Sacramento county newspaper pursuant to the provisions of section 4.961 of the School Code, as added by St. 1931, p. 719.

[1] It was not illegal for the board of trustees of Dry Creek Joint Elementary School District to designate only one voting precinct and polling place for the bond election in spite of the fact that the district was composed of parts of two different counties. Section 4.963 of the School Code, as added by St. 1931, p. 719, provides regarding the conducting of bond elections that: "The election shall be conducted as elections for school trustees of elementary school districts are conducted, except as may be otherwise provided in this chapter."

There is no provision of law in the chapter affecting school bond elections which requires more than one precinct or polling place to be designated for bond elections. In fact, the chapter contemplates the designating of one or more polling places in the discretion of the trustees. Section 4.962 of the School Code, as added by St. 1931, p. 719, provides that:

"The said notice [of election] must contain:

"1. The time and place, or places, of holding the election."

For the purpose of electing trustees of an elementary school district, section 2.875 authorizes the trustees to divide the district into several precincts as a matter of accommodation to the electors, if they see fit to do so, but that privilege is discretionary and not mandatory. The section reads: "Trustees or boards of education charged with the calling, conducting, and carrying on of elections, may subdivide the district into election precincts for the holding of the election, and may change and alter such precinct as often as occasion may require."

Section 2.870 of the same chapter contemplates that the election shall be held "at the district schoolhouse" of the dis-

trict, which infers that there shall be but one polling place, unless the trustees see fit to subdivide the district pursuant to the section above mentioned. The section last cited provides in that regard: "An election for school trustees must be held in each school district on the last Friday of March of each year, at the district schoolhouse, if there is one, and if there is none, at the place to be designated by the board of trustees."

No different procedure is prescribed by law even though the district is composed of parts of two or more counties. The failure to subdivide the school district or to designate more than one polling place for the bond election was not illegal and the bonds are not invalid on that account.

[2] We are of the opinion the statute does not require the publishing of notice of the time and place of a bond election in more than one newspaper of general circulation in the district even though the district may be comprised of portions of two or more counties in each of which there may be such newspapers. Section 4.961 of the School Code provides that: "If there is a newspaper of general circulation published in any county in which any part of the district is situated, the notice must be published therein at least once in each calendar week for three successive calendar weeks prior to the election."

[3] This section may be reasonably construed to mean that if there be one or more newspapers of general circulation published in any county, a portion of which is included in a joint school district, the notice must be published in one such paper. The section contemplates the publishing of the notice in only one newspaper. It does not require the publishing of the notice in each newspaper of two or more counties, portions of which may constitute a joint school district. If that had been the intention of the Legislature, it would have been very easy to have clearly so stated. The statute might then have said: "If there are newspapers of general circulation in one or more counties, parts of which belong to the same joint district, notices must be published in at least one such paper in each of such counties."

[4] Even though the preceding section be construed to mean that notices of the election should have been published in newspapers of both Placer county and Sacramento county, the failure to publish an official notice thereof in a Sacramento county paper is harmless and does not have the effect of invalidating the bonds under the circumstances of this case, for the reason that the publication and the posting of notices of the election are deemed to be merely directory and not mandatory in their application to a proceeding affecting the validity of the bonds after they have been carried at an election otherwise conducted according to law. The rule of law in that regard is stated in the case of County of Sonoma v. Sanborn, 1 Cal.App. (2d) 26, 33, 36 P.(2d) 419, 423, as follows:

[5] "It has been held that statutes providing for notices of a bond election are mandatory when they are applied to the situation as it exists prior to the election, but, in the interest of public policy, such statutes are construed to be merely directory in an action to invalidate the bonds after the election has been held and the bonds have been carried, in the absence of a statutory declaration that the election will be invalidated for failure to strictly pursue the statute. Section 4.982, School Code; East Bay Municipal Utility Dist., etc., v. Hadsell, 196 Cal. 725, 239 P. 38; Weisgerber v. Nez Perce County, 33 Idaho, 670, 197 P. 562; King v. Independent School Dist., etc., 46 Idaho, 800, 272 P. 507, 510; Seymour v. City of Tacoma, 6 Wash. 427, 33 P. 1059; McLoughlin v. City of Prescott, 39 Ariz. 286, 6 P.(2d) 50; State ex rel. Dore v. Superior Court, 171 Wash. 423, 18 P.(2d) 51."

[6] After a bond election has been held and carried in substantial compliance with the statute, slight irregularities which do not affect the substantial rights of the taxpayers of the district should be disregarded. Section 4.982 of the School Code, as added by St. 1931, p. 1939, provides in that regard: "No error, irregularity or omission which does not affect the substantial rights of the taxpayers within such district or the electors voting at any election at which bonds of any district of any kind or class are authorized to be issued hereunder shall invalidate the election or any bonds authorized thereby."

[7] The test for determining whether a bond election is rendered invalid for failure to strictly comply with the statute with relation to the giving of notice thereof is to ascertain whether the voters of the district generally have had knowledge of the time, place, and purpose of the election so as to give them full oppor-

tunity to attend the polls and express their will regarding the incurring of the obligation, or, upon the other hand, whether the omission has resulted in depriving a sufficient number of the qualified electors therein of the opportunity of exercising their franchise so as to change the result of the election. County of Sonoma v. Sanborn, 1 Cal.App. (2d) 26, 34, 36 P.(2d) 419; 20 C.J., p. 96, § 80; In re East Bay Municipal Utility Dist. Bonds of 1925, 196 Cal. 725, 239 P. 38; Weisgerber v. Nez Perce County, 33 Idaho, 670, 197 P. 562.

We have no hesitancy in saying from the facts of this case that every qualified elector of the Dry Creek Joint Elementary School District who had any interest whatever in school or public affairs was fully informed of the time, place, and purpose of holding the bond election in question. Every requirement of the statutes with respect to the manner and procedure of holding the bond election was strictly pursued, unless, perchance, section 4.961 of the School Code be construed to have required the publication of the official notice of the election in a newspaper published in Sacramento county in addition to the notices which were given. Every qualified elector residing in the Sacramento portion of the district, except four individuals, actually voted at the election. We are unable to see that the added publication of notice in a newspaper of the last-mentioned county would have furnished information regarding the election to any electors of the district who did not already possess that knowledge. The opposition of the four Sacramento county electors who failed to vote at the bond election would not have changed the result of the election. It does not appear that any elector of the district was ignorant of the time, place, or purpose of the election; that any person in the district who desired to vote at that election failed to do so, or that the rights of any taxpayer of the district were injuriously affected by any possible defect of notice. We are, therefore, satisfied that election was valid in every respect and that the bonds should be validated and issued by the auditor of Placer county as binding obligations of the school district.

The writ of mandamus will issue directing the auditor of Placer county to certify and issue the school bonds of Dry Creek Joint Elementary School District in the sum of $6,500 as valid obligations thereof.

We concur: PULLEN, P. J.; PLUMMER, J.



11 Cal.App.2d 156

NELSON v. CANAVAN et al.

Civ. 9997.

District Court of Appeal, First District, Division 2, California.

Jan. 9, 1936.

1. Fraud ⇐58(1)

In action for deceit arising out of purported sale of secondhand truck and trailer, plaintiff could not claim that contract of purchase was rescinded by mutual consent where evidence disclosed that defendants refused to be bound by plaintiff's rescission and proceeded to act under terms of contract as written.

2. Courts ⇐188(3)

Jurisdiction of action based on mutual rescission, and which sought judgment for $1,375, rested in municipal court and not in superior court.

3. Fraud ⇐58(1)

In action for deceit arising out of purported sale of secondhand truck and trailer, refusal to apply rule of caveat emptor *held* not error where evidence was conflicting.

4. Trial ⇐397(4)

On appeal from judgment for plaintiff suing for deceit arising out of purported sale of secondhand truck and trailer, defendants could not claim error in failure to find on allegation that plaintiff had possession of truck and trailer for one month, and that reasonable value thereof was certain sum, where no evidence was introduced in support of allegation.

5. Fraud ⇐30

In action for deceit arising out of purported sale of secondhand truck and trailer, corporation which was not party to written contract of purchase and which was not present when contract was made and whose agent did not participate in transaction *held* not responsible for wrongful acts of vendors.

6. Pleading ⇐46

In action for deceit, complaint which named corporation as a defendant and which contained allegations charging "the defend-

ants," did not fail to state cause of action against corporation, notwithstanding complaint alleged that "defendants" presented to plaintiff for his signature an agreement, and corporation allegedly was not party to agreement, where such fact did not necessarily appear on face of complaint.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Harry H. Nelson against J. Jerome Canavan and others. From a judgment for plaintiff, defendants appeal.

Reversed and remanded.

David R. Faries and J. Clifford Argue, both of Los Angeles, for appellant Paul G. Hoffman Co., Inc.

Rex Hardy and Vernon W. Hunt, both of Los Angeles, for appellant Canavan.

C. W. Pendleton, of Los Angeles, for respondent.

STURTEVANT, Justice.

From a judgment awarding damages against them in an action founded on fraud and deceit, the defendants have appealed. The alleged fraud and deceit arose out of a purported sale of a secondhand truck and trailer. Other facts will be stated as the separate points are taken up.

(1) In paragraph V of his complaint the plaintiff alleged that he relied on the false statements made to him. In paragraph VI he alleged the false representations made to him. Both paragraphs were denied and evidence thereon was introduced by each party. In preparing its findings, the trial court referred to the plaintiff's complaint by designated paragraphs. No reference whatever was made to paragraphs V and VI. The defendants assert that the findings of fact do not support a judgment based thereon. The plaintiff concedes the point, but asks that this court take such action as will result in supplying the missing findings. However, as we view the record, we are not inclined to do so.

(2) It is next claimed that the evidence is insufficient to support a judgment based upon the first cause of action. That cause of action alleged that the plaintiff had rescinded the contract of purchase. The evidence contained some slight conflicts, but it may not be said it was insufficient.

[1] (3) In the second cause of action the plaintiff alleged that the contract of purchase was rescinded by the mutual consent of the parties thereto. The defendants claim that the evidence was insufficient to support the finding in favor of the plaintiff. That claim is well founded. The evidence discloses that the plaintiff rescinded the contract but that the defendants refused to be bound thereby. It further discloses that after receiving plaintiff's notice of rescission the defendants proceeded to act under the terms of the contract as written. In that behalf it does not disclose that the defendants departed from the provisions of the contract in any respect whatsoever. The plaintiff cites Bray v. Lowery, 163 Cal. 256, 124 P. 1004. An examination of that case discloses that Lowery in material respects departed from the provisions of his contract, and, having done so, that thereafter Bray did the same thing. The facts are quite different from the facts in the instant case.

[2] (4) It is next claimed that the court had no jurisdiction of the second cause of action. Pointing to the fact that said cause is based on mutual rescission, that no equitable relief is asked, and that the relief sought is a judgment for $1,375, the amount of his expenditures, and that such relief is in a sum less than $2,000, the defendants assert that the jurisdiction rested in the municipal court and not in the superior court. They cite Jensen v. Harry H. Culver & Co., 127 Cal.App. (Supp.) 783, 15 P.(2d) 907. Since the briefs were filed Philpott v. Superior Court, 1 Cal.(2d) 512, 36 P.(2d) 635, 95 A.L.R. 990, was decided. Both cases support their contention. The same contention is not made as to the first cause of action and we are not expressing any opinion in reference to that count.

[3] (5) The defendants claim that the rule of caveat emptor should have been applied by the trial court. In this connection it again asserts that the plaintiff did not rely on the statements made by the defendants, but conducted an independent investigation and obtained advice from his associate, Felix Meyer. But, as shown in division (2), supra, the evidence contained certain conflicts and gave rise to different inferences. Under these circumstances, we think it is quite clear it may not be said the trial court erred in refusing to apply the rule of caveat emptor.

[4] (6) The defendant Canavan alleged that the plaintiff had possession of the truck and trailer for approximately one month and that the reasonable value of that use was $300. The defendants now assert that

the trial court erred in not making a finding on that issue. It is perfectly clear that no finding was made, but counsel have not quoted any evidence and have not cited us to any page in the transcript showing that any evidence was introduced by said defendant in support of his said allegations.

(7) It is also asserted that the amount of the judgment is incorrect. The judgment was rendered for $389.65. What factors entered into it the record does not disclose. Although the conditional sales contract recited that the initial payment was $375, the oral testimony was to the effect that it was $300. The plaintiff gave testimony to the effect that in traveling from Los Angeles by Garberville to Crescent City and returning by Redding, he expended in repairs $119.20. His total expenditures were therefore $419.20. That sum makes no allowance for the reasonable rental value for the use of the outfit in making said trip. However, as shown in division (6) hereof no evidence was introduced as to the value of said use. Under these circumstances a judgment in the sum of $389.65 was not erroneous.

[5] (8) It is then asserted that the judgment against the defendant Paul G. Hoffman Co., Inc., is not supported by the evidence, the findings are not supported by the evidence, and the judgment is not supported by the findings of fact. The contract of purchase, which it is claimed was made because of fraud and deceit, was in writing. Paul G. Hoffman Co., Inc., was not a party to it, was not present when it was made, and no agent of said corporation participated in any part of the transaction. Clearly that company was in no manner responsible for the wrongful acts of Canavan and Kunkel, the vendors.

[6] (9) Finally it is contended that the complaint fails to state a cause of action against Paul G. Hoffman Co., Inc. We think the point may not be sustained. In the title the plaintiff named Paul G. Hoffman Co., Inc., a corporation, one of the defendants. In the body of the pleading there are numerous allegations charging "the defendants." True it is that in one place the allegation is "said defendants presented to plaintiff for his signature an agreement." It is now said that Paul G. Hoffman Co., Inc., was not a party to the agreement. Such fact does not necessarily appear on the face of the complaint. While the complaint was ambiguous, we think it may not be said it did not state a cause of action against Paul G. Hoffman Co., Inc.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with what has been said above.

We concur: NOURSE, P. J.; SPENCE, J.

5 Cal.2d 18

LASSEN MUNICIPAL UTILITY DIST. v. HOPPER.

S. F. 15508.

Supreme Court of California.

Dec. 30, 1935.

Municipal corporations ⇐919

Under statute authorizing sale of bonds by municipal utility district for acquisition of property and tax levy for payment thereof, district *held* not authorized to issue bonds to be paid out of income derived from property purchased from proceeds of bond issue (St. 1933, p. 2400; Gen.Laws 1931, Act 6393).

In Bank.

Original proceeding for writ of mandamus by the Lassen Municipal Utility District against Paul J. Hopper, as Secretary of the Lassen Municipal Utility District.

Demurrer to petition sustained, writ of mandate discharged, and petition for issuance of peremptory writ denied.

Ben V. Curler, of Susanville (Louis Bartlett, of San Francisco, Robert L. Shinn, of Sacramento, Claude L. Rowe, of Fresno, Coyle E. Bybee, of Chico, Oran W. Palmer, of Delano, John Preston King, of Lindsay, Israel Ham, of Tulare, William J. Locke, of Alameda, Alex Webster, of Paso Robles, Albert Mansfield, of Redwood City, Arnold Rumwell, of Palo Alto, W. D. Tillotson, of Redding, Louis J. Hardie, of Oakland, Seth Millington, of Gridley, George Wadsworth, of Tracy, Arthur Frame, of Clovis, F. O. Hoover, of Modesto, Charles L. Childers, of Los Angeles, and R. W. Henderson, of Bakersfield, of counsel), for petitioner.

Grover C. Julian, of Susanville, for respondent.

J. A. Pardee, of Susanville, Farnsworth, Burke & Maddox, of Visalia, and Orrick, Palmer & Dahlquist, of San Francisco (W. H. Orrick, George Herrington, and W. J. Kenney, all of San Francisco, of counsel), amici curiæ.

WASTE, Chief Justice.

The petitioning district, a public corporation (Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53), seeks a writ of mandate commanding the respondent, its own secretary, to execute a contract duly authorized by its board of directors. The purpose of the execution of the contract, as ordered by the board, is the acquisition, construction, and completion by the district of a power project, the cost of which project will be paid out of the proceeds derived from the sale of bonds which shall be payable solely from the income earned by the property purchased with the proceeds of the loan evidenced by these "revenue bonds." The respondent refuses to execute the contract on the ground that it is illegal and invalid for several reasons, the principal one of which is that there is no legislative sanction or authority for the district to issue such revenue bonds. The decision of this question determines the entire cause. If authority for the proposed action of the district can be found, there appears no legal objection to the issuance of the bonds. That proposition has been definitely and but recently settled in this state. In our examination and consideration of the authorities cited in the case involving the issuance of bonds to be paid solely out of the revenue to be derived from the tolls to be collected from traffic using the bridge across the San Francisco bay between the cities of San Francisco and Oakland, this court found and held that such bonds, when duly authorized and issued, are legal and binding ob-

ligations of the political subdivision or authorized body issuing them. Were that the only question submitted in this proceeding, we might well rest our decision on the authority of the opinion in that case. In re California Toll Bridge Authority, 212 Cal. 298, 298 P. 485.

But, as noted, the respondent challenges the legal right of the petitioning district to issue the bonds. In order to determine that question, resort must be had to an examination and analysis of the provisions of the act under which the Lassen Municipal Utility District (petitioner) was created and functions. We must first determine if the proposed contract is valid because the district has power to enter into it. We have carefully studied the various municipal utility district acts cited and relied on by petitioner as giving the district such power. We have examined (1) St.1921, c. 218, p. 245; (2) St.1927, c. 35, p. 45 and chapter 77, p. 134; (3) St.1929, c. 31, p. 58; (4) St.1931, c. 69, p. 73 and chapter 75, p. 88; (5) St.1933, c. 924, p. 2400; (6) 2 Deering's General Laws, 1931, Act 6393. The first of these (Stats. 1921, c. 218, p. 245) is the general act providing "for the organization, incorporation, and government of municipal utility districts, authorizing such districts to incur bonded indebtedness for the acquisition and construction of works and property, and to levy and collect taxes to pay the principal and interest thereon." By the terms of that act, the utility district may "borrow money and incur indebtedness, and * * * issue bonds or other evidences of such indebtedness," on approval "of a two-thirds vote of the electors voting on the proposition to incur such indebtedness." Section 12, subd. 8. The provisions of the act set forth with minute detail the necessary steps in the procedure to be followed in order to bring about a legal and valid issue of the bonds, but we find nothing therein which expressly authorizes the issuance of bonds the principal and interest of which shall be paid solely from the revenue produced by the utility which will be acquired or constructed with the proceeds from the sale of the bonds. Neither do we find any provisions in the act which can be construed to indirectly convey such authority. Therefore, the general provision in the act that the district may "do all things necessary or convenient to the full exercise of the powers [by the act] granted" lends no support to petitioner's position.

A number of amendments to the act of 1921 have been enacted, but they relate, for the most part, to details of organization and administration of utility districts, and none of them is germane to the question we are here considering. The effective provisions of the original and amendatory acts are found in 2 Deering's General Laws (1931), Act 6393 (last of the authorities above cited). The provisions in the present statute relating to the power of utility districts to issue bonds remain the same as in the original statute of 1921. They expressly refer only to the issuance of bonds the principal and interest on which shall be paid by the levy and collection of taxes on the real and personal property in the district, authority to do so being unequivocally conferred by the act.

The legislative act creating the California Toll Bridge Authority (Stats. 1929, c. 763) provides (section 5, p. 1492) for "issuance of revenue bonds * * * to provide for such acquisition or construction [of the bridge and other improvements] * * * the payment or redemption of said bonds and the payment of the interest thereon [to be] secured only by the tolls or other revenues received from the operation of the particular" improvement "for the acquisition or construction of which the bonds were issued." The "short term notes" issued by the board of water and power commissioners of the city of Los Angeles, and the subject of consideration by this court in Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421, were authorized, and the commission expressly granted authority to issue them by the provisions of section 224 of the charter of the city. (Stats. 1925, p. 1027, at p. 1098.) In this connection, see, also, Department of Water and Power v. Vroman, 218 Cal. 206, 22 P.(2d) 698.

We are convinced that the contract sought to be entered into by the Lassen Municipal Utility District, and which the respondent refuses to execute, relates to a proceeding beyond the power of the district to consummate. Its execution would be an idle act.

It follows, therefore, that demurrer to the petition should be sustained. It is so ordered, the alternative writ of mandate is discharged, and the petition for issuance of a peremptory writ is denied.

We concur: SHENK, J.; CONREY, J.; THOMPSON, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

5 Cal.2d 26

FILLMORE UNION HIGH SCHOOL DIST. OF VENTURA COUNTY et al. v. COBB.

L. A. 14200.

Supreme Court of California.

Dec. 30, 1935.

1. Constitutional law ⇐63(3)

Statute, permitting attendance at high schools in other districts than those in which students reside only on terms agreed on by district boards or prescribed by county superintendent of schools, and requiring latter to apportion amounts agreed on or prescribed, *held* not unconstitutional as delegating legislative authority to superintendent (School Code, §§ 3.301, 3.306, as amended by St. 1931, pp. 2428, 2429).

2. Schools and school districts ⇐154

Terms, adopted by high school district boards or county superintendent of schools, for attendance at high schools in other districts than those in which pupils reside, in exercise of discretionary authority delegated by statute, are presumed to be reasonable, in absence of contrary proof (School Code, §§ 3.301, 3.309, as amended by St. 1931, pp. 2428, 2429).

3. Constitutional law ⇐62

Legislature may delegate authority to administrative boards or officers to adopt reasonable rules and terms to carry out general purpose of statute, though conferring discretion or imposing necessity on such boards or officers to determine terms, qualifications, or facts.

4. Schools and school districts ⇐154

Certain pupils' attendance at high school of another district than those in which they resided before adoption of terms and determination of amount of tuition by county superintendent of schools did not estop latter from fixing terms and conditions pursuant to statute; such pupils having acquired no vested right to attend such school (School Code, §§ 3.301, 3.306, 3.309, as amended by St. 1931, pp. 2428, 2429).

In Bank.

Appeal from Superior Court, Ventura County; Frank C. Collier, Judge.

Suit by the Fillmore Union High School District, and other such districts in Ventura County, against Blanche T. Reynolds, as County Superintendent of Schools. From a judgment for plaintiffs, defendant appealed, after which Kirk Cobb was substituted as appellant.

Judgment reversed, with direction.

Prior opinions, 43 P.(2d) 863, 44 P.(2d) 657.

Sheridan, Orr, Drapeau & Bates, James C. Hollingsworth, and Don R. Holt, all of Ventura, for appellant.

Chas. F. Blackstock, of Oxnard, and Fergus L. Fairbanks, of Fillmore, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon further consideration we are satisfied with the correctness of the conclusion reached therein, and we therefore adopt the following opinion of Mr. Justice Thompson, as modified by said court, as the opinion of this court:

The defendant Blanche T. Reynolds appealed from a judgment enjoining her, as Superintendent of Schools of Ventura County, from apportioning or transferring funds belonging to the several union high school districts which have been joined as plaintiffs in this proceeding, to compensate the Ventura Union High School District as tuition for certain pupils residing outside the last-mentioned district. The appellant contends that it is her duty, as Superintendent of Schools of Ventura County, in the absence of an agreement between the districts involved, to fix the terms and apportion the funds of the respective high school districts so as to authorize eligible pupils residing in the plaintiffs' districts to attend the Ventura Union High School District. The defendant's action in that regard is justified by her under the provisions of sections 3.301 and 3.306 of the School Code (as amended by St. 1931, pp. 2428, 2429). The respondents assert that these statutory provisions are unconstitutional for the reason that they confer an unlawful delegation of legislative authority.

Five separate organized high school districts in Ventura county are joined as plaintiffs in this proceeding. The Ventura school maintains junior college classes which are not conducted in the other schools. For several years pupils who reside in these districts represented by the plaintiffs have attended the Ventura Union High School without the imposition of terms or tuition. The school boards failed to agree upon any such terms or tuition. In the fall of 1932 the Superintendent of Schools of Ventura County fixed the terms and amount of tuition applying to pupils

residing in other districts who attend the last-mentioned school and proceeded to apportion the funds of the respective districts in accordance therewith, pursuant to the provisions of sections 3.301 and 3.306 of the School Code. The amount of tuition and the apportionment of school funds of the various districts were specified in a communication from the superintendent to the boards of the several districts as follows:

"This is * * * to inform you of the amount of tuition to be transferred from the various high schools in Ventura County sending students to the Ventura High School for the year 1931–32. * * *

"The requirements of Chapter 1141 of the Statutes of 1931 * * * prohibiting the attendance of nonresident students at any high school without an agreement between the interested school boards, has put the question up to the County Superintendent of Schools as per said statute, because no such agreement seems possible in Ventura County.

"Therefore, these are the terms prescribed for attendance of Ventura County nonresident high school students: Inasmuch as no elementary school district is allowed by law to pay to a junior high school for tuition for its seventh and eighth grade students an amount per unit of average daily attendance greater than the cost per unit in its first six grades of its own school, and, inasmuch as some of these high schools have to tax themselves to the legal limit to maintain their high schools, it is the opinion of the County Superintendent of Schools that the amount of tuition to be paid to the Ventura Union High School District for tuition in the junior college courses for the year 1931–32, and until further notice, should be the difference between the total cost per unit of average daily attendance in the district in which the student resides and the amount received per unit from the state and county.

"In the case of the two very smallest high school districts in the county, where the cost per unit is very high, the amount to be paid should be the difference between the cost per pupil in the Ventura Union High School District and the amount received from the state and county.

"Following are the costs and computations showing the amount to be paid to Ventura High School by each district. This transfer will be made at the time when the county high school tax money is received in December, 1932. The units of A. D. A. for which this tuition is transferred are taken from Mr. Van Dellen's report in July, 1932.

Cost per A. D. A. in High Schools for 1931-32.		
Fillmore	$219.20	Cost per A. D. A.
Moorpark	331.80	" "
Nordhoff	162.79	" "
Oxnard	234.61	" "
Santa Paula	188.77	" "
Simi Valley	289.59	Cost per A. D. A.
Ventura	200.36	" "
Received from State per A. D. A.	— 24.76	
Received from County per A. D. A.	— 73.50	
Received from both	98.26	

Cost per unit to the district.		
Nordhoff	$162.79	Total
Less	98.26	State & County
	64.53	Cost to District.
Santa Paula	$188.77	
Less	98.26	
	90.51	Cost to District.
Ventura	$200.36	
Less	98.26	
	102.10	

All others cost more than Ventura. Therefore the cost to Ventura will be the unit price.

Fillmore	$200.36
	98.26
	102.10
Santa Paula	$188.77
	98.26
	90.51
Nordhoff	$162.79
	98.26
	64.53

All others 102.10

Therefore the amounts of tuition to be apportioned by the County Superintendent of Schools, as required by section 3.306 of the School Code, are as follows:

From Fillmore, with 15 units of A. D. A. in the Junior College Course of the Ventura High School as reported by District Superintendent Van Dellen:

	15 times 102.10	$ 1531.50
From Moorpark	2 times 102.10	204.20
From Nordhoff	3 times 64.53	193.59
From Oxnard	35 times 102.10	3573.50
From Santa Paula	54 times 90.51	4887.54
From Simi Valley		00.00
Total all schools		10389.83

"Very truly yours,

"[Signed] Blanche T. Reynolds

"County Superintendent of Schools

"M.S."

The trial court adopted findings in accordance with the preceding statement of facts, and rendered judgment restraining the defendant from apportioning or transferring funds from the treasuries of the plaintiffs to the Ventura Union High School District as tuition for pupils residing outside the last-mentioned district. From that judgment this appeal was perfected.

[1, 2] We are of the opinion sections 3.301 and 3.306 of the School Code are not unconstitutional. They do not constitute an unlawful delegation of the legislative authority to a county superintendent of schools. The reasonableness of the rules which were adopted and the amount of tuition required to be paid by pupils living outside of the district are not questioned. We must assume from the absence of a showing to that effect that there was no abuse of discretion on the part of the Superintendent of Schools of Ventura County in fixing the terms and tuition upon which such pupils may attend the Ventura Union High School. Unless the act complained of is unconstitutional as an unlawful delegation of authority to an administrative officer, pupils are not entitled to attend a high school outside of the district in which they reside unless the terms upon which such attendance is permitted have been fixed and determined either by an agreement of the school boards of the districts which are involved or by the superintendent as provided by section 3.301 of the School Code. Section 3.309 of that Code (as amended by St. 1931, p. 2429) provides in that regard: "No student residing in one high school district shall be admitted to the high school of another high school district * * * if terms have not been agreed upon for the admission of such student as required by this article."

The two sections of the School Code, upon the asserted unconstitutionality of which the respondents in support of the judgment in this case rely, read as follows:

"3.301. Any person who is, under the provisions of this article, eligible to attend a high school and who resides in a high school district, may attend a high school in a high school district in the same county, other than that in which he resides, only upon such terms as may be agreed upon by the high school boards of the two districts, or, if such boards fail to agree, on such terms as the county superintendent of schools may prescribe."

"3.306. When terms have been made and agreed upon by high school boards as provided for in this article, or, if such boards fail to agree, when terms have been prescribed by the county superintendent or superintendents of schools, as provided in this article, the superintendent of schools of the county in which the person resides is hereby authorized and required to apportion and cause to be paid to the special fund of the high school district which such person attends, from the funds of the proper high school district or from the unapportioned county fund of his county such amounts as shall have been agreed upon by such high school boards or as shall have been prescribed by such superintendent."

The preceding sections do not delegate to the superintendent of schools legislative authority. They merely authorize the adoption of reasonable rules, terms, and conditions upon which students who reside in the county may be permitted to attend a high school other than the one in whose district they reside. Section 3.301, supra, provides for an alternative method of adopting such terms and conditions. First they are to be adopted by the interested school boards by agreement or contract, and in the event those boards fail to adopt such reasonable rules and terms, then the county superintendent of schools is authorized to do so. The attendance of the pupils in a high school within the county in a district other than the particular one in which they reside is made conditional upon the adoption of such reasonable rules and terms. The general scope or purpose of such terms is prescribed by the statute. The county superintendent is not authorized to increase or diminish the general school funds which are apportioned to the county. As a matter of equity he is merely authorized to apportion the funds already provided for by law so as to pay to the high school attended by the pupils the reasonable cost of teaching the pupils. This is certainly just and within the general scope of the act which specifically authorizes either the school boards or the administrative officer, the superintendent of schools, to adopt terms and regulations permitting pupils to attend high schools outside of the particular district in which they reside. It would be impracticable for the Legislature to attempt to specifically prescribe all the terms and rules under which pupils may be permitted to attend high schools outside the particular district in which they reside since the equity of

such terms may depend upon peculiar local conditions. It would therefore seem to be wise and proper that the adoption of such terms within the general scope prescribed by the statute be delegated to the interested school boards or to the superintendent of schools. It necessarily follows that such delegated discretionary authority should be exercised by the board or administrative officer in a fair and reasonable manner. The terms which are adopted are presumed to be reasonable, in the absence of proof to the contrary. In upholding a statute authorizing a state board of architecture to adopt rules regulating the admission of persons to practice the profession of architecture in California, the Supreme Court said in that regard in Ex parte McManus, 151 Cal. 331, 90 P. 702, 704: "The authority conferred by the terms of the statute is to pass * * * rules which must be reasonably adapted for the purpose of determining the qualifications of all applicants to practice the profession of architecture from an examination of the applicant on subjects pertaining to that profession. It was not necessary in the act to declare in terms that the rules and regulations which the board might adopt should be reasonable ones. * * * There is always implied in a grant of authority, such as here conferred, that it shall be exercised reasonably and fairly so as to effectuate the end contemplated."

[3] It is a well-established rule of law that authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer within the scope of the legislative act. 6 R.C.L. p. 179, § 179; 5 Cal.Jur. p. 683, § 97; 1 Cooley's Const. Lim. p. 228; School District No. 7, etc., v. Hunnicutt (D.C. Okl.) 51 F.(2d) 528; People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630; In re Halck, 215 Cal. 500, 11 P.(2d) 389; Ex parte McManus, 151 Cal. 331, 335, 90 P. 702; In re Weisberg, 215 Cal. 624, 12 P.(2d) 446, 450. In 1 Cooley's Const. Lim. (8th Ed.) p. 231, it is said in that regard: "Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws."

In the case of In re Weisberg, supra, in upholding a statute authorizing the state fire marshal to license certain establishments for sponging and pressing garments, the Supreme Court said with respect to these delegated powers: "We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by Carter v. Stevens, supra, 211 Cal. 281, 289–293, 295 P. 28, and Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, 'it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." Union Bridge Co. v. United States, 204 U.S. 364, 367, 27 S.Ct. 367, 51 L.Ed. 523.'"

[4] The fact that certain pupils who reside in other school districts had attended the Ventura Union High School prior to the adoption of the terms and amount of tuition therefor by the superintendent of schools does not estop that officer from

fixing the terms and conditions referred to in section 3.301 of the School Code. Such students were evidently attending that school unlawfully. The privilege of attending a high school other than the one which is situated in the same district in which the pupil resides is a mere permissive right dependent upon the previous adoption of the terms and conditions therefor by agreement of the respective school boards, or upon their failure to do so, by the superintendent of schools. Section 3.-309, School Code. The pupils acquired no vested right to attend the Ventura school by previously unlawfully doing so.

"'What has been previously said is not intended to give the superintendent of schools authority to determine rules or terms or fix tuition retroactively so as to affect pupils in their past attendance upon the school, but upon the contrary these rules and the apportionment of funds are to apply only to pupils who attend the school after the rules and terms are adopted and the apportionment made.'"

The judgment is reversed, and the court is directed to enter judgment in accordance with the foregoing opinion.

5 Cal.2d 123

DOUGLASS v. CITY OF LOS ANGELES.

L. A. 15375.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Jan. 20, 1936.

1. Municipal corporations ⇐756

Statute making municipalities liable for injuries from defective streets *held* applicable to chartered cities (St.1923, p. 675; St. 1933, p. 2147).

2. Municipal corporations ⇐742(1)

To obtain redress against city for injuries received by reason of negligent acts or omissions of its servants, claimant must rest upon liability imposed by general statutes and must conform to statutory requirements in enforcing such liability (St.1923, p. 675; St.1931, pp. 2475, 2477; St.1933, p. 2147).

3. Municipal corporations ⇐741(1, 2, 3)

Statute requiring verified claim for injuries to be filed with legislative body of city is mandatory, and compliance therewith cannot be waived by city, nor effected by filing of unverified claim (St.1931, pp. 2475, 2477).

4. Municipal corporations ⇐741(4)

Board of public works of city of Los Angeles has no authority, either express or implied, to incur liability for tortious acts or omissions of officers or employees in department of public works, hence has no duty or obligation to approve demand based on such liability (St.1925, pp. 1133, 1135–1137, 1141, §§ 343, 347–349, 354, 360, 361, 363, 376; St.1927, p. 2008, § 351; St.1931, p. 2617, § 350).

5. Municipal corporations ⇐58

As regards municipal corporations, authority granted presupposes voluntary delegation of power, and authority so delegated is strictly construed against existence of power.

6. Municipal corporations ⇐906, 956(1)

Where city concedes liability for damages, or when judgment liability is imposed by law, only municipal authority with power to provide means of payment, either by general bond issue duly authorized or by tax levy of one-tenth per annum, is city's legislative body.

7. Municipal corporations ⇐741(1)

Claim against city for damages from civil wrong committed by city's officers or employees, liability for which is imposed on city by general law, should be presented to municipal authority empowered to provide for its payment (St.1931, pp. 2475, 2477).

8. Bridges ⇐45

Claim for personal injuries caused by defective bridge maintained by city of Los Angeles must be filed with city council, and filing of such claim with board of public works is ineffectual and unnecessary (St.1923, p. 675; St.1925, pp. 1133, 1135–1137, 1141, §§ 343, 347–349, 354, 360, 361, 363, 376; St.1927, p. 2008, § 351; St.1931, p. 2617, § 350; St. 1931, pp. 2475, 2477; St.1933, p. 2147).

9. Municipal corporations ⇐741(1)

Claims for damages for tortious acts or omissions of officers and employees of city of Los Angeles must be presented to city council as prerequisite to suit, except claims based on tortious acts or omissions of employees or officers of department of water and power, harbor department, and department of education, which claims must be presented to particular department (St.1911, pp. 2101, 2125, §§ 69 et seq., 168 et seq.; St.1923, p. 675; St. 1925, pp. 1133, 1135–1137, 1141, §§ 343, 347–349, 354, 360, 361, 363, 376; St.1927, p. 2008, § 351; St.1931, p. 2617, § 350; St.1931, pp. 2475, 2477; St.1933, p. 2147).

THOMPSON, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Alice Douglass against the City of Los Angeles. From a judgment for defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 44 P.(2d) 463.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Erwin P. Werner, former City Atty., Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland and D. M. Kitzmiller, Deputy City Attys., all of Los Angeles, for respondent.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, amici curiæ, for City of Pasadena.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendant city of Los Angeles in an action to recover damages for personal injuries suffered by the plaintiff when an automobile she was driving collided with an abutment of a bridge alleged to have been maintained in a dangerous and defective condition by the city on Adams street.

At the trial the city interposed an objection to the introduction of any evidence on behalf of the plaintiff on the ground that it did not appear from the pleadings that a claim had been filed with the city council as a prerequisite to the maintenance of the action. The objection was sustained and judgment was accordingly entered for the city.

The complaint alleged that prior to the commencement of the action a claim for damages had been presented to the board of public works and had been rejected. The city, apparently assuming that the presentation of a claim to the board of public works was necessary, contended that the plaintiff could not sue unless a claim had been theretofore filed also with the clerk of the city council as required by the act of 1931 (St. 1931, p. 2475), which provides that "whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred." Section 1.

The accident involved herein occurred in June, 1932. The questions presented are whether the filing of the claim for damages with the board of public works alone was sufficient as a prerequisite to suit or whether the filing of the claim with the city council alone as required by the statute was necessary and sufficient or whether the claim should have been filed with both municipal bodies before suit could be commenced. These questions are of importance, both to the city and to those who have and will press their claims against the city, also in view of the great number of personal injury cases pending in the lower courts against the city involving alleged negligence on the part of its officers and employees. A somewhat extensive review of the law on the subject, both charter, statutory, and judicial, is deemed necessary in order to set at rest a problem that seems to have preplexed the city authorities, claimants against the city, and the lower courts.

The problem must be resolved under pertinent provisions of the law in this state, for the reason that no applicable law in other jurisdictions points to a satisfactory solution, and it will be approached, first, with relation to the general law of the state.

Prior to 1911 and until 1923, in this state persons who were injured by reason of the negligence of public officers in the maintenance of public streets and highways were compelled to seek redress against the public officers themselves, who were then personally liable. Following the injuries suffered by Mrs. Wurzburger in May, 1910, by reason of the alleged negligent maintenance of a public highway in Los Angeles county, and the verdict against Supervisor Pridham (see Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052), the Legislature in 1911 enacted a statute limiting the liability of the officer who had charge of or whose duty it was to care for or repair any street or highway to cases where such officer had *actual notice* of the dangerous or defective condition thereof. St. 1911, p. 1115. In 1919 the act of 1911 was repealed and the subject-matter re-enacted with additional provisions not here pertinent, but eliminating the word "actual" before the word "notice" as incorporated in the original statute. St. 1919, p. 756. In 1923 an act was passed further limiting the liability of members of any board of supervisors, board of city trustees, city council, board of education, or board of

school trustees on account of the negligent acts of their appointees or employees. St. 1923, p. 675. Section 2 of that act then provided that counties, municipalities, and school districts should be liable for injuries to persons and property resulting from the dangerous or defective streets, highways, etc., in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person had knowledge or notice of the defective or dangerous condition of any such street, highway, etc., and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice to remedy such condition, and take such action as might be reasonably necessary to protect the public against such dangerous or defective condition. Prior to the act of 1923 municipalities, counties, and school districts were not liable for negligent acts or omissions of their officers and employees; and it is solely by reason of that statute and amendments following it (see St. 1933, p. 2147), that municipalities, counties, and school districts are liable for the tortious acts or omissions of their officers and employees. It should be noted here, however, that the taking and damaging of private property without compensation first paid, as prohibited by section 14 of article 1 of the Constitution, is in the field of tortious action (24 Cal.Jur. p. 589 et seq.); but that is a liability imposed by the Constitution and not by statute.

[1] The important question of the liability of municipalities, counties, and school districts for the tortious acts or omissions of their servants is a matter of general state concern, and not, as contended by the plaintiff, a municipal affair. As this point is now regularly raised, we confirm the "foreword" stated by this court in Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, that it would be an anomalous situation if a city could, by adopting a freeholders' charter, exclude itself from the operation of a general law of the state imposing a liability on municipalities generally for the negligent acts or omissions of its servants in the maintenance of the public streets, on the theory that such city is independent of general laws in municipal affairs. The question of the safety of public ways is "a matter of state concern, and the obligation of a city to make its highways reasonably safe for general use cannot be chartered away, even though a municipality should attempt to do so." Id., 207 Cal. 657, page 665, 280 P. 118, 122.

[2, 3] It must inevitably follow that if a claimant in this state is to obtain redress against the city itself for injuries received by reason of the negligent acts or omissions of its servants, such claimant must rest upon the liability imposed by the general statute, and must conform with the requirements of that statute in enforcing that liability. One of the requirements of the general statute since 1931 has been that as a prerequisite to suit to enforce such liability against a city, the claimant must have filed with the clerk of the legislative body of the city, here the city council, a verified claim for damages. St. 1931, p. 2475; St. 1931, p. 2477. In the recent case of Spencer v. City of Calipatria (Cal.App.) 49 P.(2d) 320, it was held that the provisions of the statute in question requiring the filing of a verified claim is mandatory, that the city could not waive the requirement as a prerequisite to suit, and that the filing of an unverified claim was ineffectual. A petition for a hearing in this court in that case was denied on November 22, 1935. The holding therein made is hereby declared to be the law in all cases coming within its purview.

We pass to the contention, very earnestly urged by the plaintiff, that inasmuch as the purpose of laws requiring notice to municipal authorities of claims against it, the rejection of which may result in suit, is to inform the city of the claim to the end that the city may, if it desires, approve the claim and thus avoid litigation, then such purpose was subserved by the presentation of the claim as was done in this case, to the board of public works.

This contention requires a consideration of the related prior and present provisions of the city charter and the discussion must necessarily exclude from consideration all claim for the expenditure of funds in the several departments of the city government over which the respective governing or administrative officers or boards have charge and control, with specific authority in the charter to order the expenditure thereof. These funds are derived from taxes, licenses and other city revenues, and from the operation of municipally owned and controlled self-supporting enterprises maintained and operated by the city in its proprietary capacity, such as the department of water and power. We are here especially concerned with the authority of the board of public works, under power specially conferred by the city charter, to incur a liability for the tortious acts of its officers and the employees in its department; for, as will be

seen, it is only by reason of specific authority granted by the charter to incur the liability, that the claims for damages for tort must be presented to that board.

The city charter has always provided that "no payment shall be made from the City Treasury or out of the funds of the city unless the same be authorized by law or this charter nor unless the demand which is paid be duly audited as in this charter provided." Original section 216, St. 1889, p. 508; St. 1925, p. 1137, § 360. The present charter (section 361, St. 1925, p. 1137) provides that the term "audited," as used in section 360, shall mean that there has been presented to or received by the controller adequate evidence that the demand has been "approved by every board, officer or employee required by this charter to approve the same; * * * that the payment is just and lawful and has been authorized by law and that appropriation for the same has been made." Section 222 of the original charter provided that "no suit shall be brought upon any claim for money or damages against the city of Los Angeles, its board of education, or the board of directors of the Los Angeles Public Library, until a demand for the same has been presented as herein provided and rejected in whole or in part * * *." A compliance with this section was held to be mandatory. Farmers and Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795. The phrase "as herein provided," used in the last-quoted section of the original charter, had reference to other sections of the charter among which, pertinently, were sections 208 and 209 providing that "all claims and demands whatever against the city of Los Angeles," other than claims and demands on city bonds, shall be presented to the *city council*, except demands payable out of the school fund and the library fund.

Upon the establishment, by charter amendment in 1903, of the water department, to be administered by the board of water commissioners, section 209 was amended to except from the requirement of presentation of claims to the city council all demands payable out of the water revenue fund and section 213½ was added providing that demands payable out of that fund should be presented to and approved by the board of water commissioners. St. 1903, p. 567. Section 222 was likewise amended in 1903 to provide that no suit should be brought against the board of water commissioners until a demand had been presented to that board and rejected in whole or in part. St. 1903, p. 568.

Section 209 was again amended in 1907 providing a further exception to the requirement that demands be presented to the city council, namely, demands payable out of funds derived from the sale of certain bonds issued by the city, which demands were required by section 213¾ (added in 1907) to be presented to the board of public works. St. 1907, pp. 1166, 1167.

In 1911 for the first time we find the language of the charter which is of significance in the solution of the problem under consideration. It is found in section 217 (St. 1911, p. 2152). With exceptions not material here that section provides: "Every claim and demand against the city of Los Angeles * * * shall be first presented to and approved by the board, commission or officer authorized by this charter to incur the expenditure or liability represented thereby." The substance and legal effect of old section 217 was incorporated in section 363 of the new charter of 1925 and is now in effect (St. 1925, p. 1137).

The exceptions contained in section 222 of the original charter and as supplemented by the further exceptions by charter amendment in 1903 and 1907 above noted and in 1911 (section 222g, St. 1911, p. 2155) were carried forward in the amendment of section 222g in 1921 (St. 1921, p. 1817), but were eliminated in 1925 and the subject-matter incorporated in section 376 of the new charter as follows: "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city until a demand for the same has been presented as herein provided, and rejected in whole or in part." St. 1925, p. 1141.

When the specific designation of the board or commission to which a demand must be presented, rather than to the city council, was eliminated in 1925, and the general provisions of section 376 came into being, much confusion arose as to where demands should be filed, as a prerequisite to suit, whether with the board or commission in whose department the claim arose or with the city council. Apparently no serious difficulty was experienced by claimants against the city or by the city authorities on the subject until the elimination of the specific exceptions and the adoption of the general language of section 376 in the new charter. That general language is that no suit shall be brought for money or dam-

ages against the city or any officer or board of the city, until a demand has been presented "as herein provided." The last-quoted phrase must refer to the pertinent provisions for presentation of claims and demands in section 363. There it is provided that every claim and demand against the city, with exceptions not material, shall be first presented to and approved in writing by the board, officer or employee *authorized by the charter to incur the liability.*

[4, 5] The demand here pressed against the city is an alleged liability for the tortious acts or omissions of officers or employees in the department of public works. Unless the board in charge of that department is *authorized by the charter to incur that liability,* there can be no obligation or duty on the part of that board to approve a demand based on that liability. We look in vain for any provision of the charter constituting any authority whatsoever for any officer or board of the city to incur the liability here sued on. Authority granted presupposes a voluntary delegation of power. And authority so delegated is strictly construed against the existence of the power. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; 12 Cal.Jur., p. 801.

The board of public works has no authority, either express or implied, to incur such a liability. In truth, it would appear to be an unheard of thing in municipal law even to attempt to authorize a municipal officer or board to incur a liability for a tort. The liability is not created that way. It is imposed on the municipality by virtue of the superior authority of the sovereign state and results in no sense from a voluntary assumption of liability under power previously granted. Redress on account of such a liability must be afforded by the municipal authority having control over a fund from which the claim can be paid. The board of public works has no such fund. It is limited in its authority to order the expenditure of moneys from the city treasury to its budget allowance established by action of the mayor in conjunction with the director of the bureau of budget and efficiency (charter, St. 1925, p. 1133, § 343), and approved by the city council (charter, St. 1925, p. 1135, §§ 347-349; p. 1135, § 350, as amended by St. 1931, p. 2617), or as such budget allowance may be supplemented by a transfer to it of an additional sum by special appropriation under the authority of section 354 of the charter (page 1136). This board is prohibited from making any expenditure from its fund in excess of its budget allowance unless specially authorized by the city council. Charter, St. 1925, p. 1135, § 351, as amended by St. 1927, p. 2008. It is not enough to say that the board of public works had the authority to contract the work or improvement or to remedy the defective or dangerous condition of the street. It does not follow that the board was therefore authorized by the charter to commit the civil wrong in the execution or maintenance of the work. As stated, the redress for the wrong does not flow from authority granted but from liability imposed by a superior governmental power.

[6] By section 361 (page 1137) the controller is prohibited from auditing a claim against the city unless the payment is authorized by law and an appropriation for the same has been made. The charter does not contemplate that the budget allowance for the board of public works shall include an item to cover payment for damages for a civil wrong that may thereafter be committed by the officers or employees of the board. That board has no power to make an appropriation from city funds in settlement of a claim for damages for injuries to person or property asserted against the city. If it should attempt to do so its approval of the claim would not constitute authority for its audit by the controller, at least until an appropriation therefor had been made by the city council. And such approval would not be binding on the city council to compel an appropriation. The theory of the law requiring the filing of a claim before suit contemplates that if the claim be just and proper the municipal officer or body with which the claim is filed shall have power to approve payment without suit and make such approved claim a valid claim against the city without the necessity of the claimant reducing the demand to judgment. If the board has no such authority the filing of a claim with it would be futile and would thus fail to bring notice of the claim to the municipal authority having power to order the claim paid, without suit. The reason for this is obvious. Claims for damages arising from the tortious acts or omissions of the officers and employees of the city are, almost without exception, for an unliquidated amount. The amount might be so enormous as to be entirely beyond the power to pay out of the current revenues of the city or any of its departments. When liability for damages is conceded by the city, as in the case of the destruction of the St. Francis dam, and the appalling re-

sultant damages of many millions of dollars, or when a judgment liability is imposed by law as involved in Le Clerg v. City of San Diego, 218 Cal. 494, 24 P.(2d) 156, and Title Guarantee & Trust Company v. City of Long Beach (Cal.Sup.) 47 P.(2d) 472, the only municipal authority with power to provide the means of payment, either by general bond issue duly authorized or by tax levy of one-tenth per annum, is the city's legislative body.

[7, 8] It therefore appears obvious that the municipal authority to which a claim against the city for damages for injuries to persons or property in consequence of a civil wrong committed by the officers, or employees, liability for which is now imposed on the city itself by general law, should be presented, is the municipal authority which under the law has the power to provide for its payment. That authority, both under the city charter and under the general law of 1923, with reference to the claim here involved, is the city council and the filing of such a demand with the board of public works was ineffectual and unnecessary.

The establishment of the rule as above indicated makes for certainty in the procedure and is workable from a practical standpoint. When such a claim is filed with the city clerk it is, of course, deemed to be thereby presented to the city council. When the claim arises in any department of the city, with certain exceptions later to be noted, the usual course no doubt has been and would be for the council to refer the matter of the claim to the board or officer in whose department it arose, or to the legal department of the city, or to both, for investigation and report as to the status of the claim as a valid or invalid demand against the city. Upon such investigation and report the council would be in a position to approve the same and make an appropriation for the payment thereof, or to reject the claim, as in the charter provided.

[9] The departments of the city which would fall within the exceptions to the rule here announced are, first, the department of water and power, and, second, the harbor department.

The department of water and power is conducted by the city in its proprietary capacity. This department has control of its own revenues and disbursements and in the ordinary course of its management would not be dependent on the city council for an appropriation to meet a demand for damages for the negligence of its officers or employees. The liability of the city for such negligence, through the operations of such a department, was established long before the enactment of the statute of 1923. Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.(N.S.) 536, 9 Ann.Cas. 847. And the necessity of presenting a claim to that board as a prerequisite to suit was properly declared in Continental Insurance Co. v. City of Los Angeles, 92 Cal. App. 585, 268 P. 920.

Likewise the harbor department, established by charter amendment in 1911 (St. 1911, p. 2125, § 168 et seq.), may be classed as a department under the management of an independent board with power to fix the charges for its own revenue and having control of the disbursement thereof. In the ordinary course of the business of that department it is assumed that its own funds would be sufficient to satisfy any claims for damages arising in that department. In Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.(2d) 918, suit was brought against the city on account of the death of a boy who was killed on a drawbridge, the maintenance and operation of which was under the charge and control of the board of harbor commissioners. It was held that an action was not maintainable against the city in the absence of a showing that a claim had been filed with that board.

The other exception logically flowing from the charter provisions and the general law is a demand arising in the department of education. The original charter (sections 69–80, St. 1889, p. 479) had made elaborate provisions for the election of a board of education with full control over the amount of money necessary to be raised for the school department and the disbursement thereof freed from interference by the city council, but as in the charter specially provided. These provisions remained in the city charter until the exclusion therefrom of the fiscal processes of the board of education as matters of general state concern and the consequent amendment of article 7 of the charter in 1911. (St. 1911, p. 2101, § 69 et seq.)

As presently advised there appears to us to be no other department of the city government which should be excepted from the rule that claims for damages for tortious acts or omissions of city officers and employees must first be presented to the city council as a prerequisite to suit. There are other departments such as the library department, the park department, and the

playground and recreation department, which have independent revenues, either from the exaction of fees or charges for services or from a definite tax levy guaranteed by charter provision. But if the revenues of those departments were found to be inadequate to satisfy valid claims for tort arising in those departments, undoubtedly the council's power of appropriation for a specific municipal purpose, or of tax levy for such purpose, would have to be resorted to in order to satisfy such claims.

The rule of decision in this state in matters pertaining to the presentation of claims against the city for damages to persons and property on account of the negligent acts or omissions of officers and agents of the city has been in conformity with the rule laid down herein and brief reference will be made to the cases.

The cases of Continental Insurance Co. v. City of Los Angeles and Huey v. City of Los Angeles have been referred to and distinguished.

The next case is Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993. There a mother sued the city for damages on account of the death of her son who fell into a water hole in a storm drain and was drowned. It did not appear that she ever filed a claim or demand against the city or any of its boards or officers. It was held that the demurrer to her complaint was properly sustained on that ground. What was said in the opinion with reference to the necessity of filing a claim with the board of public works was unnecessary to the decision and cannot be deemed an authoritative pronouncement on the subject.

We next note the case of Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.(2d) 506, which was an action for damages for injuries to real property caused by work done by the board of public works pursuant to an ordinance of intention of the city council under the Boundary Line Act (St. 1911, p. 1018). The claim for damages was filed with the city council and duly rejected. On the appeal the city contended that the claim should have been presented to the board of public works. It was properly held after a review of the pertinent provisions of the charter that the city council and not the board of public works was the municipal body to which the claim should be and was presented.

The next case is Haigh v. City of Los Angeles, 139 Cal.App. 595, 596, 34 P.(2d) 779, 780, which was an action for damages to real property resulting from a street improvement constructed by the board of public works. On the question directly presented it was held that under no reasonable interpretation of the city charter could it be said that that board had "the power to incur the liability for damages such as is sued upon herein," and that the claim was properly filed with the city council.

Next we note the case of Robertson v. City of Los Angeles (Cal.App.) 44 P.(2d) 461, an action for damages for personal injuries resulting from the operation by a police officer of an automobile owned by the city. The claim had been presented to and rejected by the city council. The trial court sustained an objection to the introduction of any evidence against it on the ground that the claim had not been presented to the police commission. The judgment in favor of the city was reversed on the ground that the claim was properly presented to the city council and that the presentation thereof to the police commission was unnecessary.

The last case decided by the District Court of Appeal and which has become final appears to be Rogers v. City of Los Angeles, 44 P.(2d) 465, an action for damages for personal injuries received by the plaintiff minor when a city-owned ambulance struck the automobile in which he was riding. The claim was filed with the city council and rejected. On the appeal the city contended that the claim should have been filed with the police surgeon who was in charge of the receiving hospital in connection with which the ambulance was operated. The contention was rejected and it was held that the claim was properly presented to the city council.

It will thus be seen that in every case decided by the District Courts of Appeal which involved an action for damages for injuries either to persons or property as a result of the tortious act or omission of an officer or agent of the city and in which the question was squarely presented and involved, it was held that the claim was properly presented to the city council, except when the claim arose in the department of water and power and in the harbor department.

In each of the cases decided by the District Courts of Appeal and above referred to, with the exception of the Continental Insurance Company Case, a petition for hearing in this court was filed, and in each case the petition was denied. This fact is noted to indicate that this court must have been aware that an important

question of procedure was involved and that a rule of decision was thereby being established which claimants against the city might feel reasonably safe in following. That such a rule of decision had theretofore been established in the District Courts of Appeal is stated in the concurring opinion of Presiding Justice Stephens in the recent Robertson Case, supra.

We conclude that the city council is the sole municipal authority to which the claim for damages involved herein should have been presented as a prerequisite to suit, and that since it appears that the claim was not so presented the action may not be maintained.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; CONREY, J.

THOMPSON, Justice (concurring and dissenting).

I concur in the judgment but dissent from that portion of the opinion construing the charter provisions. There are numerous authorities from other jurisdictions, as well as the cases of Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163, Continental Insurance Co. v. City of Los Angeles, 92 Cal.App. 585, 268 P. 920, and Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, which not only indicate that practically all large municipalities are protected by a rule designed for a purpose similar to that of section 363 of the charter, but also that the purpose of such a rule is twofold. It aids in the auditing of proper claims and advises the city of claims that it may make its investigation and prevent litigation where the circumstances warrant such action. Continental Insurance Co. v. City of Los Angeles, supra, especially points out the various purposes served by such a rule. Entirely in harmony with the foregoing are the cases of Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, and Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.(2d) 918. In the Beeson Case a child of the age of ten years, playing near a storm drain, fell into a water hole and was drowned. The demand was served upon the city council. The District Court of Appeal, after quoting applicable provisions of the charter, concluded that the demand should have been presented to the board of public works. In the Huey Case a fifteen year old lad was accidentally killed on a drawbridge maintained by the city of Los Angeles. The court held, with respect to a demand presented to the city council, that it was "not proper or effective for any purpose" and should have been presented to the board of harbor commissioners.

It is a fundamental rule of statutory construction that the provision under scrutiny should be given such construction as will fully attain its object and purpose. That can be done in the present case by construing the section as though it read that "such claim 'shall be presented to the board, officer or employee' whose act or omission has incurred the liability." It cannot be done by construing the section to mean that the city council is one of the boards included within the section, and this in the face of the fact that the city council was designedly dropped from the wording of the section. If, however, the section is construed as I think it should be, the claim would go to the board or department of the municipal government which should be conversant with the facts giving rise to the liability. Its report thereon, with approval or rejection, would then be presented (according to section 365 of the charter) to the controller, who, if the claim is not properly payable out of any fund, must, according to the same section, transmit the same to the council. The council, being advised, is in a position to allow or disallow as a result of the examination made. If, however, by judicial construction the process defined by the charter provisions is reversed, and the claim is allowed to be presented to the council, it must be referred to the board, then to the controller and back to the council for action. Not only that, but it must be conceded that claims must be presented to those departments having control of their own revenues. Why, then, should the rule not be uniform? The rule should be uniform, and it should coincide with the procedure outlined by other provisions of the charter.

We arrive at the same result by another line of reasoning. Let us suppose a case of street improvement where the owner has, under section 3 of part 1 of the Street Improvement Act (St. 1911, p. 733, as amended by St. 1929, p. 1652), filed his protest to the proposed grade or modification of grade. Under such circumstances the damages to his property have presumably been estimated and included within the assessment for the improvements and are properly payable therefrom. Assuming that proper notice has been given and preliminary procedure observed, it cannot be doubted that

the board of public works incurred the liability if damage was in fact done to the property. Manifestly such a claim, under the charter provision and under the authority of Spencer v. City of Los Angeles, supra, would have to be presented to the board of public works, as would all other claims of a contractual nature incurred by it under its authority (conferred by charter) to contract for street improvements and its duty to keep the streets in repair. It will thus be seen that any other interpretation than the one herein would result in endless confusion.

I do not feel that the cases of Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.(2d) 506, and Haigh v. City of Los Angeles, 139 Cal.App. 595, 34 P.(2d) 779, should control the rule or be considered as sufficient to establish the rule that the city council is the proper body to which the demand should be presented. It cannot be said as a matter of law that the city council incurred the liability involved in those cases. A complete answer to this suggestion is found in Eachus v. Los Angeles Consolidated Electric Railway Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149, and Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712.

We ought, therefore, to avoid setting aside the procedure outlined in the charter by judicial construction and, in order to prevent confusion arising out of the nature of the claim to be presented, I am convinced that the claim should have been, in so far as the charter provisions are concerned, presented to the board of public works, that board being charged with the responsibility of keeping the streets in repair.



5 Cal.2d 140

COTTLE et al. v. CITY OF LOS ANGELES.

L. A. 15374.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Jan. 30, 1936.

1. Eminent domain ⇐280

Ordinance of intention to make street improvement must refer to new grade to give notice to property owners and put them to necessity of protesting to protect their action for damages (Gen.Laws 1931, Act 8199, §§ 3, 6).

2. Eminent domain ⇐280

Where ordinance of intention to make street improvement gives notice of intention to change grade, property owners must protest proposed change of grade to protect their action for damages (Gen.Laws 1931, Act 8199, §§ 3, 6).

3. Eminent domain ⇐280

Where there is no established grade and ordinance of intention to make street improvement gives notice that grading will be done, referring reader to plans and profiles for more accurate information, statutory requirements are met, and property owners must file protest to protect their action for damages (Gen.Laws 1931, Act 8199, §§ 3, 6).

4. Eminent domain ⇐262(1)

Judgment awarding property owner damages on account of cut in one abutting street and fill in another abutting street required reversal, where property owners were not entitled to damages for cut and reviewing court could not determine allocation of damages.

5. Eminent domain ⇐277

Property owners' claim for damages from change in grade of streets *held* properly filed with city council rather than board of public works.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Charles Cottle and another against the City of Los Angeles. Judgment for plaintiffs, and defendant appeals. Reversed.

For prior opinion, see 43 P.(2d) 861.

Erwin P. Werner, former City Atty., Frederick Von Schrader, Asst. City Atty., and George A. Dockweiler, Jerrell Babb, and G. Ellsworth Meyer, Deputy City Attys., and Ray L. Chesebro, City Atty., all of Los Angeles, for appellant.

E. H. Delorey, A. Feldman, and William W. Bearman, all of Los Angeles, for respondents.

PER CURIAM.

This action was brought to recover for damage to the property of plaintiffs caused by the construction and improvement of Riverside drive and the changing of intersecting streets to meet the alterations caused therein by the building of Riverside drive. The plaintiffs owned lots 1 and 2

in tract 2199 in the city of Los Angeles. The two lots formed a triangular parcel of land. Glen Eden street ran along the southeasterly side of the property and Riverside drive (now Riverside terrace) ran along the westerly edge. Prior to the adoption of the ordinance of intention here involved, by condemnation proceedings, to which these plaintiffs were parties, receiving an award of $6,580 including severance damage of $2,950 for property taken from them, the city acquired a 100-foot strip on the northerly side of plaintiffs' lots for the new location of Riverside drive. Riverside drive was constructed below the level of the lots, it being 11¼ feet below the northwesterly corner and 8 feet below the northeasterly corner. Riverside terrace (old Riverside drive) was raised above the level of plaintiffs' property, it being 13 feet above at the northwesterly corner and 6 feet above at the southwesterly corner. Apparently Glen Eden street went from 6 feet above to 8 feet below. The plaintiffs recovered a judgment for the damage caused by the cut and fill in the sum of $1,100. The city has appealed from the judgment.

The contention of the appellant is twofold: First, it asserts that the respondents were given due notice of the intended work, and having failed to protest within the time required by law, waived any claim for damages. Second, it claims that because the plaintiffs filed their claim for damages with the city council instead of with the board of public works, the plaintiffs are precluded from recovering in this action.

Considering these contentions in the order made, we first discover that by the ordinance of intention notice was given that Riverside drive would "be improved by certain grading, by the construction of certain concrete pavement, cement curb, cement sidewalk," etc. (mentioning other improvements not necessary to detail) and that "Gleneden street, between the easterly line of Riverside terrace and a line 155 feet northeasterly from and parallel with the northeasterly line of Riverside drive, be improved by certain grading," etc. (here follow the other improvements), and Riverside terrace was similarly described. In section 2 of the ordinance it is provided: "That all the work aforesaid shall be done in accordance with, and to the grade shown on special plans and profiles numbered P-1507, P-479, 23618" (six other numbers), "P-1867, (fourteen other numbers) and standard plans numbered," etc. Plans 23618 and P-1867 detail the work to be done and which was performed surrounding the property of respondents and disclose the cut and fill already mentioned. Prior to the expiration of the time for respondents to protest they went to the city engineer's office and, according to the testimony of Mrs. Cottle, he informed them there would be a cut of from 4 to 6 feet in front of their property.

A portion of section 3, part 1 of the Street Improvement Act of 1911, as amended St.1929, p. 1652 (Deering's Gen.Laws 1931, Act 8199, p. 4525) reads as follows: "The grade to which any work shall be done or improvement made shall be such as may be shown on the plans or profiles therefor or it may be done on such a grade as may have been formally established by the city council. If any official grade has already been adopted or established for any of the streets, avenues, or other places or property, proposed to be improved, it shall be lawful for the resolution of intention to provide that said work shall be done to new grades or grades different from those so established or adopted, and shall refer to plans, profiles or specifications for the description of the grade at which the work is to be done. Any property owner whose property is to be assessed to pay the costs and expenses of the proposed improvement may at the time fixed in the resolution of intention for hearing of objections to the proposed work and improvement, appear before the city council and make objection to the proposed grade or proposed modification of grade. A failure to make objection at such time shall be deemed to be a waiver of all objections to the proposed grade or proposed change or modification of grade and shall operate as a bar to any claim for damages or any subsequent action looking to the prevention of the work or the recovery of damages on account of the performance of the work to such grade or changed grade."

[1-4] Section 6 of the same act (as amended by St.1931, p. 1571) provides that the protest must be in writing. It is a fact that respondents filed no protest and the court so found. It was found, however, as follows: "That the reason that said plaintiffs filed no objections was because said plaintiffs had no objection to the proposed grade and proposed modification of grade; that the said plaintiffs never at any time had any intention to, nor did they waive

their right to recover damages on account of the performance of the work on such grade or changed grade, as contemplated by said ordinance or otherwise; it is not true that the plaintiffs are barred from any action for the purpose of recovering damages on account of the performance of the work referred to in said ordinance of intention." There is no direct finding upon the question of whether respondents were given due notice. And, although the trial judge advised counsel that it might be important to prove whether the grade had been established, the record is void of any evidence with respect to the streets Glen Eden and Riverside terrace. The improvement act, the pertinent portion of which we have quoted, contemplates that when there is to be a change of grade the ordinance of intention shall refer to a new grade in order to give notice to the property owners and put them to the necessity of protesting in order to protect their action for damages if any is to accrue from the performance of the work. Such has been held with respect to section 4 of the Boundary Line Act of 1911 (Deering's Gen.Laws 1931, Act 8200, p. 4581, St.1929, p. 1716), the language of which is very similar to that of the section here involved. Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.(2d) 506. Where, however, there is no established grade and the ordinance of intention gives notice that grading will be done, referring the reader to the plans and profiles for more accurate information, the requirements of the section are met. Snoffer v. City of Los Angeles (Cal.App.) 43 P.(2d) 852, and cases there cited. The property owner in such event is put to the necessity of filing his protest. We have this situation in the present case. The construction of Riverside drive along the northly side of respondents' property was new work. The property had been condemned for street purposes. Respondents were consequently given proper notice with respect to the cut involved in the performance of this work. But with respect to the other streets we cannot say whether they were given proper notice. However, assuming that they were not bound by the notice given, the damages were awarded as a result of the cut and the fill. We have no way of telling what amount of damage was caused by the one and what by the other. Consequently the case must be reversed on this ground.

[5] The second contention of the appellant is that the claim filed with the city council was insufficient as a prerequisite to suit, and that the claim should have been filed with the board of public works. This subject has been treated at some length in the case of Douglass v. City of Los Angeles (Cal.Sup.) 53 P.(2d) 353, opinion in which is filed this day. On the authority of the decision in that case the second contention of the appellants is unavailing. The claim was properly filed with the city council.

The judgment is reversed.



5 Cal.2d 150

LANGENDORF UNITED BAKERIES, Inc., v. PHILLIPS et al.

S. F. 15368.

Supreme Court of California.

Jan. 13, 1936.

Rehearing Denied Feb. 10, 1936.

Injunction ⇐61(2)

Assignee of purchaser of baking business and good will thereof *held* entitled to preliminary injunction to restrain president of vendor company and his employees from soliciting company's former customers listed in trade route books which were not delivered to purchaser.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Langendorf United Bakeries, Inc., against S. M. Phillips, individually and doing business under the name of Major Phillips and others. From an order granting an injunction pendente lite, defendants appeal.

Affirmed.

Joseph A. Brown, of San Francisco, for appellants.

Heller, Ehrman, White & McAuliffe, Samuel S. Stevens, and F. W. Tenney, all of San Francisco, for respondent.

THOMPSON, Justice.

Plaintiff brought this action to restrain the defendants from soliciting former cus-

tomers of the Phillips Baking Company to purchase from appellants bread and other bakery products, and this is an appeal by appellants from a preliminary injunction granted against them.

The circumstances giving rise to the litigation, according to the allegations of the complaint and supporting affidavits, are not greatly complicated. Some time prior to September 7, 1934, the Phillips Baking Company had been engaged in the baking and sale of bread and other bakery products in the city and county of San Francisco, and also prior to that date had become financially involved and had filed a proceeding in the United States District Court under section 77B of the Bankruptcy Act, as added by Act June 7, 1934 (see 48 U.S.Stat. p. 912) for a corporate reorganization. During the pendency of this proceeding, one Milton Meyer made an offer to purchase the "baking equipment, machinery, trucks, accounts receivable, inventory, good will, copyrights, registered trade-marks and all appurtenances of said business" for the sum of $35,000. On September 7th, after an order was made approving and confirming the sale to Meyer, the Phillips Baking Company, by S. M. Phillips, its president, and I. S. Phillips, secretary, executed a bill of sale covering the property already described to Milton Meyer, who subsequently conveyed the same to the respondent. From affidavits it is made to appear that, before the appellant S. M. Phillips would accept the Meyer offer, he had to be assured that he would be forgiven certain obligations owed by him and the directors and employees to the corporation. However, in consideration of such release, Meyer exacted from appellant S. M. Phillips, who apparently owned most of the stock, a promise that he would not engage in the baking business "in San Francisco and vicinity under the name of Phillips Baking Company, or any similar name, or any name in which the name of Phillips is used," and further that he would not "use any of the following names in connection with his products, to wit: Phillips, Indian, Veribest, Electricbake, or any of the names copyrighted or otherwise, designs or color schemes heretofore and now used by said Phillips Baking Company." Within such restrictions, appellant was granted the right to engage in the baking business in San Francisco under the name of "First Lady Bread" or "Major Phillips."

It is also alleged that on September 7th the Phillips Baking Company had approximately thirteen trade routes, which trade routes were designated in trade route books, some of which books were never delivered to Meyer, although the routes and books constituted a material part of the good will of the business. It is then alleged that, on the 10th of September, respondents, doing business under the name of Major Phillips, commenced soliciting and delivering bread and bakery products to the former customers listed in the trade route books. An order to show cause was issued by the United States District Court, directed to S. M. Phillips and the Phillips Baking Company, requiring them to appear and show cause why the books should not be delivered and why they should not be restrained from such solicitation. That court made an order requiring the delivery of the books, but, upon the statement of appellant that he had discharged all of his drivers and shut down his business, and would not re-employ the drivers, the order to show cause was discharged. It is then alleged that one route, the "restaurant route," was particularly valuable, and that on September 16th, the day following the order of the United States District Court, one of the former drivers of appellant accompanied the appellant Walter Weber over the restaurant route, soliciting former customers for appellant doing business under the name of Major Phillips, who has been and is engaged in the bakery business, and who has been since September 7th soliciting former customers of the Phillips Baking Company. Finally, it is alleged that such solicitation will be of irreparable and increasing injury and damage to the respondent. Some of the averments of respondent's affidavits were denied and some of the allegations of the complaint were likewise negatived by affidavits on behalf of appellants, but the denials were not of such a character as to deprive the judge of the trial court of the right to conclude in accordance with the facts we have already outlined.

The appellants contend as follows:

(1) In the sale of the good will of a corporation an individual who is an officer of the corporation is not restricted from thereafter engaging in the same business under his own name and soliciting business from former customers of the corporation as long as he engages in no unfair competition.

(2) In the absence of an agreement not to engage in a similar business in the same

neighborhood, the seller of a business has the right to re-engage in the same line of business.

(3) The complaint shows by the bill of sale, made a part thereof, the defendant was expressly granted permission to re-engage in the same business.

(4) The sale, being a judicial sale, and involuntary, did not prevent the appellant from re-engaging in the same business and soliciting former patrons of the corporation.

We have thus stated in hæc verba the exact contentions of appellants because it appears therefrom that they have to a degree misconceived the nature of the complaint filed against them. It is framed, in part at least, upon the theory that respondent is entitled to restrain the officers and employees of the Phillips Baking Company, purchased by respondent, from making use, to respondent's injury and damage, of valuable information of a confidential character. It is in fact conceded that appellant Phillips has the right to re-engage in business under the name used by him. The allegations of the complaint and the averments of the supporting affidavits are sufficient to warrant the court in believing that the appellant S. M. Phillips, through his agents and employees, was deliberately and designedly using the information he had secured as an officer of the Phillips Baking Company to undermine and injure the business sold to the respondent. This brings the case squarely within the rule recently announced by this court in Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal. (2d) 460, 41 P.(2d) 340, and the authorities there cited. The injunction pendente lite does no more than to restrain appellant S. M. Phillips, doing business as Major Phillips, and his agents and employees, from soliciting former customers, and must be read in the light of the rule announced in the case to which we have referred. It is therefore apparent that the contentions above recited do not require discussion separately. What we have already said disposes of the additional contention that the facts and the evidence did not warrant the issuance of the temporary injunction.

It is also asserted that the court erred in admitting parol testimony to vary the terms of the bill of sale. Evidently what is meant by the assignment is that the court should not have considered affidavits which purported to show the facts surrounding the inclusion within the bill of sale of the provision that appellant should have the right to re-engage in business under the name of "First Lady Bread" or "Major Phillips." Here again it is necessary but to call attention to the fact that the injunction was authorized to prevent unfair and unjust competition. We have no way of telling whether the trial judge considered the affidavits in this particular of any weight, a fact which demonstrates that error may not be predicated thereon, even though the testimony might not have been admissible, a point which we do not decide.

The order granting the injunction pendente lite is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; CONREY, J.



11 Cal.App.2d 197

PEOPLE v. HEWITT.

Cr. 2823.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1936.

1. Homicide ⇐341

Failure to instruct that defendant could not be convicted for attempted murder unless jury should find that she intended to take life of victim *held* not reversible error, where under evidence no verdict could be justified other than that of guilty.

2. Criminal law ⇐863(2)

In prosecution under amended information charging attempted murder, recalling of jury and giving of appropriate instructions on attempted murder after court had originally charged on subject of assault with deadly weapon with intent to commit murder *held* not error.

3. Homicide ⇐268

Defendant's guilt of attempted murder *held* for jury.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Lorraine Hewitt was convicted of attempted murder, and she appeals.

Affirmed.

S. S. Hahn, W. O. Graf, and Phi O. Clough, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was charged in an information with the crime of attempted murder of Joseph E. Walsh. She was found guilty by a jury and appeals from the judgment and from the order denying a new trial. Defendant and Walsh had lived together for a period of about two years prior to August 30, 1935, except during the last two months of this period. About 6 o'clock in the evening of August 30, 1935, Walsh and the defendant held a telephone conversation in which they arranged to meet later at his "place." Walsh did not keep the appointment, but attended a dinner party at the home of a mutual friend at which there were present two other men and three women. Defendant had not been invited to this party. At about 9 o'clock of the same evening, while the dinner guests were seated at a table in the dining room, defendant appeared in the doorway with a revolver. Walsh was seated directly facing her as she stood in the doorway. At that moment the dinner guests were laughing at some story which had been told. Defendant said, "This is a fine how-do-you-do" and "this is not going to be funny," whereupon she raised the revolver and fired four shots at Walsh, wounding him in the chest and in the right arm. Defendant then left the premises and was arrested the following morning. These facts are undisputed.

[1] Defendant's main contention on appeal is that the court erred in not instructing the jury that the defendant could not be convicted of attempted murder unless the jury should find that she intended to take the life of Mr. Walsh. Defendant relies upon the case of People v. Mize, 80 Cal. 41, 22 P. 80, in which it is held that the intention to take human life must be proved in order to establish the crime of attempted murder. We do not think, however, that there should be a reversal of the judgment in this case for failure to give the instructions offered. The evidence of the guilt of the defendant is so overwhelming that no verdict could be justified other than that returned by the jury.

[2] After the jurors had been sent out to deliberate, the court of its own motion recalled them for further instructions. In its original instructions the court had informed the jury on the subject of the law pertaining to assault with a deadly weapon with intent to commit murder. When the jury was recalled, the court instructed them that they should disregard the instruction on this point, and then instructed them on the law pertaining to attempted murder as charged in the amended information. This action on the part of the court is now assigned as error; the defendant arguing that it tended to confuse the jury. Under the circumstances, the action of the court was proper in recalling the jury to give them appropriate instructions, and it is apparent that the defendant was not prejudiced thereby.

[3] Defendant also contends that the court of its own motion should have directed the jury that it could return a verdict finding defendant guilty of assault with a deadly weapon or of simple assault. As heretofore pointed out, the evidence could lead to but one conclusion, that of guilt of the crime charged. The court was justified in submitting this issue only to the jury. There has been no miscarriage of justice.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



11 Cal.App.2d 263

ASSOCIATED CONSTRUCTORS, Inc., v. PAONESSA et al.

Civ. 5449.

District Court of Appeal, Third District, California.

Jan. 16, 1936.

1. Contracts ⇐316(3)

Filing of notice of completion of building and specification of errors in its construction *held* not to estop owners from complaining of other defects, where notice was filed only to start running of lien time and with understanding between parties that it was not waiver of any defects in structure.

2. Contracts ⇐316(3)

That architect, employed by owners of building after its construction was begun, pointed out certain defects after its comple-

tion, *held* not to preclude owners from making further objection, since additional defects might have occurred prior to architect's going on job.

3. Contracts ⇐305(3)

Payment of balance of cost of construction of building after its completion *held* not to estop owners from complaining of defects in construction, where builder had withdrawn such money, which had been deposited with syndicate, without owners' consent, after agreeing to let it remain on deposit until lien claims should have been filed.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Associated Constructors, Incorporated, against Alfred E. Paonessa and others, wherein defendants Alfred E. Paonessa and Dorothy Paonessa filed a cross-complaint. Judgment for cross-complainants, and plaintiff appeals.

Affirmed.

George S. Hupp, of Los Angeles, for appellant.

Hal Hughes and Ralph D. Paonessa, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment wherein it was held that plaintiff take nothing as against defendants, and that cross-complainants Alfred E. Paonessa and Dorothy Paonessa recover judgment against plaintiff, for failure to construct a residence according to certain plans and specifications.

It appears that defendants Mr. and Mrs. Paonessa entered into a contract with plaintiff for the erection of a home. The lot upon which the structure was to be erected was irregular in shape and sloped sharply from the rear toward the front. The first dispute arose as to the location of the building upon the lot, but this difference was finally settled by an engineer engaged for that purpose. The manner in which the foundations were laid, however, required a change in certain dimensions as originally agreed upon by the parties. During the progress of the building operations, defendants were almost daily on the job, but after the work had been carried on about two months an architect was engaged to inspect the construction, who from that time on supervised the job. Shortly before plaintiff tendered the building to defendants, the architect wrote to the builder requiring certain changes in the work, which were made.

[1, 2] The builder, appellant herein, insists that by the filing and recording of the notice of completion and the specification of certain particular errors in the construction of the building, the owners were estopped from complaining of other defects. The court found, however, in regard to the notice of completion, it was filed only for the purpose of starting the running of the lien time for the protection of the contractor and it was understood between the parties that such notice was not an admission of compliance with the contract or a waiver of any defects in the structure. The claim that respondents are precluded from making further objection to the material and workmanship, because the architect had pointed out some, is likewise not tenable. There is nothing to show but what these additional defects might have occurred prior to the architect going on the job, and furthermore, after receipt of the letter from the architect the builder admitted all of the defects and agreed to correct the same.

[3] Appellant also claims that the payment of the balance of the money remaining in the hands of Syndicate Mortgage Company after the completion of the structure constituted an acceptance by defendants and estopped them from complaining of defects in material or workmanship, but in that regard plaintiff had agreed to let the money covering the final payment remain in the custody of the syndicate until all lien claimants should have filed their claims and until adjustments could be made and agreed upon between the parties, but without the knowledge or consent, however, of defendants, plaintiff withdrew this money subsequent to this understanding.

Appellants cite several cases dealing with the duty of the owner to complain where the building is not in accordance with the specifications, but in the instant case there was no inspector until the job had been in the course of construction more than sixty days, and when complaint was made the builder admitted the justice of the complaint and agreed to remedy the defects.

We need not discuss the facts further nor review the citations set forth in the briefs. The court found the building was not constructed in accordance with the plans and specifications, some latent, others obvious, and enumerated a long list of such deflections, all of which the court found to exist, and which, according to the bill of exceptions, were either proven or admitted.

There are no particular principles of law involved, and therefore, finding no legal ground for the objections of appellant, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



11 Cal.App.2d 44

SCALF v. EICHER et al.

Civ. 9596.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1935.

Rehearing Denied Jan. 25, 1936.

Hearing Denied by Supreme Court Feb. 24, 1936.

1. Automobiles ⇐160(1), 216

Pedestrian and driver of vehicle have equal rights to use of highway, subject to exercise of due care and caution and in accordance with provisions of statute or ordinance (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

2. Automobiles ⇐162(6)

As respects liability for death of boy who was struck from rear on highway by automobile, words and phrases in traffic rules should be reasonably construed (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

3. Automobiles ⇐218

Pedestrians must use portion of highway prepared for their use, and if there is no pathway, lane, or sidewalk, then pedestrian may walk on his left-hand edge of portion of highway used by vehicles (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

4. Automobiles ⇐218

Word "highway" within statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway refers to way or place of whatever nature open to use of public for travel (St. 1929, p. 546, § 150½).

[Ed. Note.—For other definitions of "Highway," see Words & Phrases.]

5. Automobiles ⇐223(1)

As respects contributory negligence of boy who was struck from rear by automobile on highway which had no sidewalk, boy in walking on dirt shoulder was using "highway" within statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway (St.1929, p. 546, § 150½).

6. Automobiles ⇐218

Word "otherwise" within statute prohibiting pedestrian from walking along highway otherwise than close to his left-hand edge of highway *held* to make it unlawful for pedestrian to walk along highway in any manner except "close to his left-hand edge of the highway" (St.1929, p. 546, § 150½).

[Ed. Note.—For other definitions of "Otherwise," see Words & Phrases.]

7. Automobiles ⇐218

Violation of statute by walking on right-hand shoulder of highway *held* negligence per se as respects liability for death of pedestrian who was struck by automobile from rear (St. 1929, p. 546, § 150½; St.1931, p. 2102, § 21).

8. Automobiles ⇐245(90)

In action for death of fifteen year old boy who was struck by automobile from rear while walking on right-hand shoulder of highway outside of business or residence district, where there was no sidewalk, whether boy's violation of law proximately contributed to death *held* for jury (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

9. Appeal and error ⇐1064(1)
Automobiles ⇐246(35)

In action for death of boy who was struck from rear by automobile while walking on right-hand shoulder of highway outside of business or residence district, where there was no sidewalk, instruction that decedent had right to walk on graveled portion or dirt shoulder on his right-hand side of highway *held* prejudicially erroneous (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

10. Trial ⇐296(4, 5)

Error in instructing that decedent had right to walk on graveled portion or dirt shoulder on his right-hand side of highway *held* not cured by instruction embodying language of statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21).

11. Automobiles ⇐242(8)

In action for death of boy who was struck by automobile, plaintiff was entitled to rely upon presumption that decedent had taken ordinary care of his own concerns (Code Civ.Proc. § 1963, subd. 4).

12. Automobiles ⇐242(8)

Mere violation of statute prohibiting pedestrian from walking along highway outside of business or residence district otherwise than close to his left-hand edge of highway did not overcome presumption that decedent took ordinary care of his own concerns, unless there was evidence that violation proximately contributed to accident (St.1929, p. 546, § 150½; Code Civ.Proc. § 1963, subd. 4).

13. Negligence ⇐121(1)

Violation of statute or ordinance, which proximately contributes to injuries, is presumptively act of negligence unless act or omission is justifiable or excusable under circumstances.

14. Negligence ⇐136(9, 25)

Whether violation of statute or ordinance proximately contributed to accident and whether violation was excusable or justifiable are questions of fact, except where court is impelled to say that from facts reasonable men can draw but one inference pointing to negligence of plaintiff contributing to injury.

15. Negligence ⇐85(1)

Standard of care required, even of a minor, cannot be measured by examples that others have violated law, thereby excusing act of decedent in committing like violation.

16. Automobiles ⇐245(74)

Responsibility of deceased fifteen year old boy who was struck by automobile at night while walking on right-hand shoulder of highway *held* for jury (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21; Code Civ.Proc. § 1963, subd. 4).

17. Appeal and error ⇐1111

On appeal, any decision may be made in a case that its proper disposition requires.

18. Appeal and error ⇐1175(5)

Judgment would not be entered for defendants on reversal of judgment for plaintiff where record did not disclose that negligence of plaintiff's decedent in walking on right-hand shoulder of highway at night constituted contributory negligence as matter of law (St.1929, p. 546, § 150½; St.1931, p. 2102, § 21; Code Civ.Proc. § 1963, subd. 4; Const. art. 6, § 4½).

19. Appeal and error ⇐1170(1)

Purpose of constitutional provision that harmless errors may be disregarded is to mitigate possibility of miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Leo C. Scalf, an incompetent, by Virginia E. Scalf, his guardian ad litem, against Frank Eicher and others. From a judgment for plaintiff, defendants appeal.

Reversed.

James H. Phillips and Elliott Johnson, both of Oakland, and Louis V. Crowley, of San Francisco, for appellants.

Carl Appelbaum, Lewis N. Mitchell, and Appelbaum & Mitchell, all of Oakland, for respondent.

WARD, Justice pro tem.

Leo C. Scalf, an incompetent, by Virginia E. Scalf, his guardian ad litem, brought this action against defendants to recover damages for the death of Leo Howard Scalf, a minor, the son of the incompetent and his guardian ad litem. The transcript of evidence shows the following state of facts: San Leandro street is a public street running in a general easterly and westerly direction in the city of Oakland. There are no intersecting streets entering San Leandro street between Eighty-Fifth avenue on the east and Seventy-Seventh avenue on the west for a distance of approximately 2000 feet. There is no accepted sidewalk and no demarkation of sidewalks by curb lines. The width of the street is 50 feet. Thirty feet of the street is surfaced with metal macadam. On each side of the paved portion of the roadway are dirt and graveled shoulders. No place for pedestrians to walk is provided, but the workers in nearby canneries use the improved portion of the highway in going to and from their places of employment.

On the date of the accident the deceased, about fifteen years of age, in company with Joseph Caruso, also a minor, had been gathering firewood in a field near by to San Leandro street. The boys pulling and shoving a play wagon entered the street and walked along their left side of the road for a distance of about 200 feet, at which point they crossed the road and proceeded on their right side of the highway on the shoulder thereof for a

distance of 400 feet. There was no light or warning sign attached to the play wagon. It was "dusk or dark or getting dark." At the same time and place an automobile owned by the defendant Eicher, who was riding therein, and driven by defendant Moseley, was proceeding in a westerly direction on the right-hand side of the highway, with headlights on, either fully or with dimmers. The headlights of a passing automobile proceeding in the opposite direction "blinded" the driver of the Eicher car. Just what happened is not clear from the contradictory statements in the evidence except that the Eicher automobile hit the deceased and his companion and proceeded about 300 feet on the right shoulder of the highway before it came to rest with its right front wheel in a ditch to the north of the shoulder of the road. The minor Caruso was injured, and the Scalf boy died shortly after as a result of the impact. The small wagon was demolished and the firewood scattered on the north shoulder, the paved portion of the road and in ditches near by. There was glass and débris found indicating that the impact had taken place on the dirt shoulder on the north side. It was stipulated that the accident occurred outside of a business or residence district. There is no dispute concerning any fact which is essential to the determination of the major questions here presented, namely, Was the deceased guilty of negligence which contributed proximately to the accident, and if so, was the act or omission of the deceased contributory negligence as a matter of law? We find no contention in appellants' briefs that the driver of the car was not negligent, and we therefore proceed to a consideration of this case upon the assumption that the driver of the car was negligent. The evidence was ample to justify the conclusion that defendant Moseley was the agent of the defendant Eicher, and if this case should be retried the pleadings should be amended to conform to the proof.

[1, 2] Section 150½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, c. 253, § 66, p. 546) provides: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway." Section 21 of the same act amended by St. 1931, p. 2102 defines a highway as follows: "Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks." Connected with the part of San Leandro street referred to in the pleadings and in the evidence, there was no sidewalk and no portion of the highway "prepared for use by pedestrians as sidewalks." A pedestrian and a driver of a vehicle have equal rights to the use of a highway, subject to the exercise of due care and caution and in accordance with the provisions of any statute or ordinance. The locus of the accident in this case was outside of a business or residence district and it was incumbent, therefore, upon the deceased to walk "close to his left-hand edge of the highway." Appellants contend that "edge of the highway" means the extreme side of the portion of the area of land dedicated as a highway. The topography of San Leandro street near the scene of the accident, as described by witnesses, is sufficient refutation of this contention. The construction given to the meaning of words and phrases used in ever changing, and necessarily changing, traffic rules should be reasonable and practical. The evidence reveals the fact that the extreme border lines of this highway are covered with grass and weeds, and on the north side there is a ditch. The photographs of the scene of the accident, made a part of the transcript on appeal, indicate that walking in the ditch or through weeds would be not only inconvenient and unsuitable, but rather hazardous, particularly to one pulling or shoving a small wagon loaded with firewood.

[3] Section 150½ of the California Vehicle Act is applicable to highways outside of a business or residence district. When read in conjunction with section 21 of the same act, pedestrians must use a portion of the highway prepared for the use of pedestrians. If there is no pathway or lane or sidewalk so used, then the pedestrian may walk on his left-hand edge of the portion of the highway used by vehicles. The following citations submitted by appellants are not in point. In Corcoran v. Pacific Auto Stages, Inc., 116 Cal.App. 35, 38, 2 P.(2d) 225, the court found the evidence disclosed that the accident occurred in a business or residence district, and section 150½ of the Californ-

ia Vehicle Act was not applicable. Catton v. Kerns, 123 Cal.App. 94, at page 97, 10 P.(2d) 1036, 1037, was a "crossing" case in which the court held: "The requirement that a pedestrian proceed 'close to his left-hand edge of the highway' is not very well applicable to a person crossing the road" and reversed the judgment for the reason that an instruction embodying section 150½ of the California Vehicle Act was improper in view of the pleadings and evidence.

[4, 5] Respondent contends that section 150½ of the California Vehicle Act applies only to the paved, improved, or main-traveled part of the highway, and particularly so within the limits of a city where no means of walking is provided other than the dirt shoulder. We cannot approve of this theory. Section 150½ is not limited to districts within or without city limits. It simply provides that it must be "outside of a business or residence district." The word "highway" as used in various statutes and ordinances may have a meaning somewhat different, depending upon the purpose of the provision of the law. Under sections 2618 and 2620 of the Political Code, a highway is a road, street, etc., of a width of at least 40 feet. The purpose of these sections is to define the requisites necessary for the dedication of land as a highway. When used in the California Vehicle Act, the word "highway" has specific reference to a way or place of whatever nature open to the use of the public for travel. When used in section 122 of the California Vehicle Act (as amended by St. 1931, p. 2124) in reference to driving on the right side of the highway, close to the edge or curb, it has reference to the paved or traveled portion of the roadway, close to the curb if possible, and otherwise, close to the edge of the main or frequently traveled portion of the road. In the present case, to have driven the car on the extreme right side of the road would have forced the driver to place one wheel in a ditch. In section 136 of the California Vehicle Act (as amended by St. 1931, p. 2128) a driver is prohibited from parking, with certain exceptions, on the paved or improved or main traveled portion of the highway when it is practicable to park the vehicle off the main-traveled path. This means that if there is a portion of the highway not frequently traveled, such portion is to be used if it can be done with safety. In many instances such part of the highway is a shoulder, and necessarily a portion of the highway. The Legislature in enacting section 150½ of the California Vehicle Act undoubtedly had in mind that a pedestrian could walk on his left-hand edge of any portion of a highway that was available and suitable for walking purposes, with due regard for the safety of the pedestrian and traffic generally. We must conclude that the deceased, in walking on the shoulder, was using the "highway" as that word is employed in section 150½ of the California Vehicle Act.

The section provides that it "shall be unlawful for any pedestrian to walk along and upon any highway * * * otherwise than close to his left-hand edge." The evidence in this case shows without conflict that the deceased was on his right-hand side of the shoulder of the highway, and under the provisions of the section, unlawfully so. The purpose of the section is that the pedestrian may have the benefit of seeing an on-coming vehicle and take such action as may be necessary for his own safety. The provisions of the section protect a pedestrian from the quiet approach of a vehicle, or the confusion that may arise from the noise of the mechanism of a vehicle approaching from the rear. A pedestrian who does not walk on his left-hand edge of the road is not availing himself of every reasonable precaution for his safety. In Olson v. Meacham, 129 Cal.App. 670, at page 678, 19 P.(2d) 527, 531, the record shows that the deceased was struck down while walking along the graveled portion on his left side of the highway, and the court said: "Section 150½ of the California Vehicle Act * * * requires pedestrians on the highway to walk along the left-hand side and near the outer edge. The deceased was not only where he had a legal right to be, but where the provisions of the California Vehicle Act required that he should be."

Counsel for respondent relies upon Silvey v. Harm, 120 Cal.App. 561, at page 568, 8 P.(2d) 570, 573, wherein the court said: "The dirt shoulders adjacent to the paved portion of a highway are not deemed to be a part of the main-traveled portion of the highway, under such circumstances as exist in this case." The court in the Silvey Case was construing the phrase "main traveled portion of a public highway" as distinguished from the infrequently used portion of the highway. In the Silvey Case the court also said: "The shoulders are used to serve in emer-

gencies or during congested traffic." In Coughman v. Harman, 135 Cal.App. 49, 26 P.(2d) 851, there was no well-defined shoulder; the gravel forming part of the property of a service station had been spread right up to the paved portion of the road. In that case the decedent was actually on the premises of the service station, which constituted no part of the roadway. The court held that the right of way does not extend to the entire width of the highway belonging to the state. This view is in consonance with the opinion herein expressed as applied to the facts of this case.

Highland v. Chas. H. Lilly Co., 175 Wash. 507, 27 P.(2d) 693, 695, is cited by respondent. A Washington statute forbids automobiles from running off the main-traveled part of the highway except for certain purposes. In the Highland Case the pedestrian was walking along the shoulder of the road. On appeal, the court said: "This court is committed to the doctrine that the statutory duty of a pedestrian," as prescribed by statute, "has relation to the paved or main traveled portion of the highway. * * * Clearly, subdivision 6 does not apply to a pedestrian walking on the shoulder where vehicles are forbidden to travel." Highland v. Chas. H. Lilly Co., supra.

[6-8] There is no statutory provision in California prohibiting the use by vehicles of the dirt portion or graveled part of the highway. The use of the word "otherwise" in the California statute, which does not appear in the Washington statute (Rem.Rev.Stat.Wash. § 6362—41, subd. 6), makes it plain that it is unlawful in this state for a pedestrian to walk along a highway in any manner except "close to his left-hand edge of the highway." In walking upon the right shoulder of the highway, decedent violated the law. This violation was negligence per se. Unless the violation of the law proximately contributed to the death of decedent, it would be immaterial. Whether or not the violation of the law proximately contributed to the death was a question of fact for the jury to determine.

[9, 10] The court gave the following instruction: "I instruct you that although it is provided by the law of this state that it is unlawful for a pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway, yet this provision of the law has no application to a pedestrian who is walking on the graveled or dirt shoulder portion of the road on his right-hand side which is not part of the paved, improved or main traveled part of the highway used by motor vehicles. And where there is a graveled portion or dirt shoulder on the right-hand side of the highway, other than the paved, improved or main traveled portion of the highway used by motor vehicles, a pedestrian has the right to walk upon such portion of the road and has equal rights with the driver of an automobile so far as such portion is concerned, and the driver of an automobile who runs or drives his or her machine off of the main traveled portion of the highway onto the graveled portion where a pedestrian is walking, is bound to exercise reasonable and ordinary care to avoid striking such pedestrian." Therein the jury was instructed that the decedent had the right to walk on the graveled portion or dirt shoulder on his right-hand side of the highway. This assumed a right in fact as well as in law. The instruction was erroneous and evidently was predicated upon the trial court's conclusion that a shoulder is not part of the vehicle traveled portion of the highway. The instruction was not cured by the instruction embodying the language of section 150½ of the California Vehicle Act or by other instructions given. The complained of instruction was not a correct statement of the law and was prejudicial to the rights of the defendants. Olson v. Meacham, supra. In Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 62, 15 P.(2d) 217, 222, the trial court instructed the jury that the deceased had a right to travel on foot on the right-hand side of the road On appeal the court held: "This took away from the jury consideration of the question of whether or not this negligence per se of the deceased, if any, contributed to his death." For the reasons stated heretofore, this cause must be reversed.

Appellants contend that a reversal is not adequate under the facts and the law, but that judgment should be entered for the defendants, and call attention to Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.(2d) 553, a case in which a plaintiff pedestrian violated an ordinance providing that no pedestrian shall cross a roadway, when within the central traffic district, etc., other than by a crosswalk. There was near the scene of the

accident no pedestrian lane or crosswalk or anything that could be said to constitute an invitation to a pedestrian to cross the street. Plaintiff was an adult and "The physical situation, as disclosed by the facts, was sufficient to apprise a person of ordinary caution that he was assuming a hazard in undertaking to cross Stockton street at the point where the unfortunate injury occurred." Hopkins v. Galland Mercantile Laundry Co., supra. In the Hopkins Case the pedestrian placed himself in a position behind a truck where the driver could not see him. The truck backed into the plaintiff. A perusal of the transcript of evidence in that case indicates that the act of plaintiff was the sole proximate cause of the accident.

[11-14] In the present case it was possible to see the boys, and if the automobile had remained on the right-hand paved side of the highway the accident would not have occurred. Young Scalf was not available as a witness. Plaintiff therefore was entitled to rely upon the presumption that the decedent had taken ordinary care of his own concerns. Code Civ.Proc. § 1963, subd. 4; Smellie v. Southern Pacific Co., 212 Cal. 540–561, 299 P. 529. Defendants sought to overcome and dispel this presumption by evidence that decedent had violated section 150½ of the California Vehicle Act. The mere violation of the provisions of the act would not be sufficient to controvert and overcome the presumption, but there must be evidence to the effect that the act or omission constituting the violation proximately contributed to the accident. The violation of a statute or ordinance which proximately contributes to the injuries is presumptively an act of negligence unless the act or omission was justifiable or excusable under the circumstances. Mora v. Favilla, 186 Cal. 199–207, 199 P. 17; Shearman & Redfield on Negligence (6th Ed.) § 467. Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where "the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369, 370.

[15, 16] The cold record in type in this case fails to disclose any explanation of the violation of the statute in walking along the right-hand side of the highway unless it be in the fact that the north side of the shoulder was three feet wider than the south shoulder, and we are not prepared to say that this fact, standing alone, would be sufficient to excuse the violation of the law by decedent. There was evidence that others had used this highway for the purpose of going to and returning from neighborhood canneries, and no doubt used the shoulders of the road, but the standard of care required, even of a minor, cannot be measured by examples that others have violated the law, thereby excusing the act of decedent in committing a like violation. The responsibility of the decedent was a question to be determined by the jury from all the facts and circumstances of the case. In Barrett v. Harman, 115 Cal.App. 283, 286, 1 P.(2d) 458, 459, the court said: "There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712."

[17-19] Appellants presented evidence upon the theory that the highway embraced the entire width of the street. The position of the respondent was that the width of the highway was confined to the paved portion of the road, and the trial judge adopted and upheld this latter contention. Respondent's claim that decedent had a legal privilege to walk upon the right-hand side of the shoulder of the highway is untenable. Upon a second trial, respondent may submit evidence, if any exists, justifying and excusing decedent's violation of the law. On appeal, any decision may be made in a case that its proper disposition requires. We do not believe that on this appeal an order should be made directing that judgment should be entered in favor of defendants. We are not prepared to say from the record as it stands that the negligence of the decedent was contributory negligence as a matter of law. The purpose of section 4½ of article 6 of the Constitution is to mitigate the possibility of a miscarriage of justice.

The judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

11 Cal.App.2d 79

HALTER v. MALONE et al.

Civ. 10468.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1935.

Hearing Denied by Supreme Court Feb. 27, 1936.

1. Appeal and error ⇐930(1)

On appeal from judgment for plaintiff, facts should be viewed most favorably to plaintiff.

2. Automobiles ⇐181(1)

Word "wilful" used in phrase "wilful misconduct" in automobile guest statute, implies intent, but intention relates to misconduct and not merely to fact that some act was intentionally done (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

3. Automobiles ⇐181(1)

"Wilful misconduct," within automobile guest statute, does not mean sort of misconduct involved in any negligence nor mere intent to do act which constitutes negligence (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

4. Automobiles ⇐244(20)

In guest's action for injuries sustained when host's automobile ran into embankment as he attempted to pass behind truck which had entered highway from private drive, evidence *held* insufficient to sustain finding of willful misconduct within guest statute (St. 1931, p. 1693, § 141¾).

5. Appeal and error ⇐702(1)

Failure of appellant, objecting to certain instructions upon subject as to which number of instructions had been given, to print in full in his brief all other instructions given bearing upon such subject, precluded appellant from presenting point on appeal (District Court of Appeals Rules, rule 8).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Carl A. Halter against L. B. Malone and Richard Starling. Judgment for plaintiff, and defendants appeal separately.

Reversed as to Richard Starling, and affirmed as to L. B. Malone.

Prior opinion, 52 P.(2d) 258.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for appellant Malone.

David D. Stuart, Finlayson, Bennett & Morrow, and Henry L. Knoop, all of Los Angeles, for appellant Starling.

Elbert E. Hensley, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an action for damages for personal injuries arising out of an automobile accident. The plaintiff was a guest in the car of defendant Starling in an automobile which Starling was driving along a through boulevard highway as defined by section 22½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 509) in a district which was neither a business nor a residence district. Defendant Malone entered this highway in front of the approaching car of defendant Starling from a private driveway, and to avoid a collison Starling attempted to turn into the private driveway and the injuries followed. In order to recover against the defendant Malone it was necessary to prove negligence. In order to recover against the defendant Starling it was necessary to prove willful misconduct as distinguished from negligence or gross negligence. The jury returned a verdict against both defendants, and the appeal is from the judgment thereon. Defendants each prosecute separate appeals.

For a statement of the facts we quote from the plaintiff's briefs as follows: "Plaintiff and respondent was one of three guests riding in appellant Starling's Dodge car. As it proceeded south on Fremont avenue it was traveling at a speed variously estimated at from thirty-five to sixty-five or seventy miles per hour. (Last estimate is by appellant Malone. * * *) Malone, in a Model 'T' Ford truck entered Fremont in an easterly direction from a private driveway. When Starling first saw the truck Starling's Dodge was about 175 feet away. At that time Starling thought the truck would let him go by in front of it since it was stopped with its front wheels in the west gutter of the street. Accordingly he veered somewhat toward the center of the street. Malone, however, continued out into Fremont, driving his truck slowly until, as Malone admits, his front wheels were 3 or 4 feet beyond the center of the street, and

suddenly and without giving any warning or signal, stopped his truck."

[1] Plaintiff's brief continues: "As Malone drew out Starling decided to go behind the truck and so turned to his right, or west. However, as he approached the opening behind the truck, Malone's vehicle stopped and moved backward, thus effectually closing the opening in the street through which Starling had expected to drive. Malone admits this testimony of plaintiff's witnesses on page 8 of his brief and its importance cannot be overestimated. It was this sudden stopping and backward movement on the part of Malone's truck which caused Starling to turn sharply into the private driveway from which Malone had come. Starling was unable to avoid hitting an embankment on the far (or southerly) side of the driveway, producing severe and permanent injuries to respondent." The above statement of facts, having been made by plaintiff, undoubtedly states them most favorably to the plaintiff, as indeed it should.

In justice to the trial court it should be observed that the case of Meek v. Fowler (Cal.Sup.) 45 P.(2d) 194, 197, had not been determined at the time of the trial of the instant case. In the Meek Case the Supreme Court says that it does not attempt to reconcile the several definitions and applications given to the phrase "willful misconduct" which had arisen in the cases, but adopts as a satisfactory definition of willful misconduct certain language used in the cases of Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988, and Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279, 281. The Meek Case is now the settled law on this subject.

The plaintiff, in order to justify the judgment against Starling, quotes and stresses a part of the last sentence in the passage adopted from the case of Howard v. Howard, supra, as follows: "Willful misconduct implies at least * * * the intentional doing of an act with a wanton and reckless disregard of its possible result."

The plaintiff argues that the defendant Starling was guilty of willful misconduct as follows: "What did appellant do as he approached the truck? Did he slow down in a prudent manner, keeping his car under control for a sudden stop on the part of Malone, as any ordinarily careful driver would have done? No. Deliberately and intentionally, as he himself admitted, and knowing that a stop on Malone's part would, in turn, force him to stop or turn to one side to avoid a collison, he continued to approach the truck at a speed of 45 miles per hour [or more] with only the very slightest application of his brakes. It was not until he was within 40 or 50 feet of the truck that he applied his brakes 'hard' but even then he was not trying to stop the car. Yet he testified that at that point he believed he could have stopped his car before he got to the truck. It was not until he was a mere 20 or 30 feet from the truck that he applied his brakes 'real hard.'"

[2, 3] With regard to the plaintiff's claim that all of Starling's actions in guiding his car and applying his brakes were done "deliberately and intentionally," it should be borne in mind that the intent which is included in and implied by the phrase "wilful misconduct" relates to the misconduct and not merely to the fact that some act was intentionally done. "While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence." Meek v. Fowler, supra.

[4] There is an entire lack of any substantial evidence of an intention on the part of Starling to do an act with a wanton and reckless disregard of its possible result. This is made especially clear by the statement of the facts in plaintiff's own language.

Paraphrasing the last paragraph of the opinion in the case of Meek v. Fowler, supra, the evidence in the present case is capable of but one construction, namely, that the acts and conduct of the driver of the guest car, whether he was driving at a normal or excessive rate of speed, was a result of his conclusion, mistaken though his judgment might have been, that he could safely do as he did. However, as he approached the opening behind the truck, Malone "suddenly and without giving any warning or signal stopped his truck" "and moved backward, thus effectually closing the opening in the street through which

Starling had expected to drive." His conduct under the circumstances constitutes at most gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of or that he was utterly indifferent to the rights of his guest. While his judgment under the circumstances confronting him might have been poor, it does not appear that he was wantonly reckless in exposing his guest to danger, nor did his conduct partake of a willful, intentional wrong. We are loath to reverse a judgment which is based upon the verdict of a jury. Nevertheless this is a case where the record seems to lead inexorably to such a result.

Other points raised by defendant Starling will not be discussed, as they will not arise upon a new trial.

[5] With regard to the appeal of the defendant Malone, he contends that the trial court erred in instructing the jury in the words of the statute that "the driver of a vehicle entering a public highway from a private road or drive shall yield to all vehicles approaching on such public highway" followed by the instruction that if Malone did not yield the right of way he was guilty of negligence as a matter of law. He argues that the court should have combined with this instruction the element that the statute should be given a reasonable construction and that Malone's duty was only to exercise ordinary care to obey the statute and to "behave as a reasonable man would behave with the privilege of perhaps committing errors of judgment not amounting to negligence." The same criticism is made of another instruction in which the court instructed the jury in the language of the statute, "the driver of any vehicle upon a public highway, before starting, turning or stopping such vehicle, shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety," without adding to the instruction a similar instruction to the effect that Malone's duty was to use such precaution as would satisfy a reasonably prudent person acting under similar circumstances. Plaintiff, in answering this contention, calls attention to the fact that defendant Malone has not complied with rule VIII of this court, wherein it is provided that "where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in appellant's brief." A number of instructions were given on the subject in question, most of them at the request of defendant Malone, in which the duty of Malone under the circumstances is clearly and properly stated. These instructions were not printed by Malone in his opening brief. In another instruction the court instructed the jury to consider all the instructions as a whole. Since defendant Malone failed to print in his brief "all other instructions given upon the subject" he cannot now present the point. Coats v. Hathorn, 121 Cal.App. 257, 8 P.(2d) 1038. However, we have examined all the instructions on the subject, for the reason that defendant Starling maintains that they were too favorable to Malone and therefore injurious to Starling. We find that the instructions as a whole fairly stated the law on these points. There has been no miscarriage of justice as to Malone such as would entitle him to a reversal.

The judgment is reversed as to defendant Starling and is affirmed as to the defendant Malone.

I concur: McCOMB, Justice pro tem.

WOOD, Justice (dissenting).

I dissent as to the reversal of the judgment against defendant Starling. The evidence should be stated most favorably to plaintiff, who recovered the judgment, and in my view of the evidence the majority opinion omits the most important facts upon which the jury's verdict rests. Substantial evidence was presented to establish that Starling drove his car down Fletcher avenue at 65 or 70 miles per hour; that as he approached Malone's truck he passed a vehicle moving more slowly; that he did not apply his brakes "real hard" until he was 20 or 30 feet from the truck; that he "flashed" behind the truck and across a driveway 60 feet in width at the rate of 50 miles per hour, so fast, indeed, that he crashed into an embankment on the far side of the driveway with such force as to severely injure one of the occupants of his car. The Starling car left tire marks on the pavement estimated as far as 160 feet.

By the implied finding of the jury it must be held that Starling drove his car down the street at a speed which under the circumstances shown in evidence was not

only excessive but was also in violation of law. Such action on his part was undoubtedly misconduct and Starling must be held under the jury's verdict to have known it was misconduct. He drove his car intentionally at a rate of speed in violation of law. Such action was not alone misconduct, it was willful. He intentionally performed an act which was unlawful.

The facts in Meek v. Fowler, cited in the majority opinion, are not similar to the facts of the present case. In that case defendant drove his car across a street intersection, increasing his speed to cross in front of the other car, and in holding his conduct to be a result of a mistake of judgment, the Supreme Court said: "The evidence in the present case is capable of but one construction, viz., that the attempt of the driver of the guest car to cross the intersection in advance of the Peckinpah car, whether he was driving at a normal or an excessive rate of speed, was the result of his conclusion, mistaken though his judgment may have been, that he could safely negotiate said crossing before the arrival of the other car." The case before us does not involve a mistake of judgment, but rather an intentional driving at a rate of speed under circumstances which bring it within the terms of a definition set forth in the case of Meek v. Fowler: "The phrase 'willful misconduct,' as employed in our so-called guest statute, has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.(2d) 988, 990, wherein it is declared that '"willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'" Starling's conduct in intentionally driving at a rate of speed and under the circumstances shown in the evidence brings him within the provision of the first part of the definition just quoted, and his failure to apply his brakes properly until 20 or 30 feet from the truck brings him within the provision of the second part of the definition.

The Constitution assigns to the Legislature the duty of enacting the laws and to the jury the duty of passing upon the facts. The words "willful" and "misconduct" are simple and are well understood by the citizenry. The Legislature would have provided an explanation or qualification of their use if such had been deemed necessary. Manifestly the Legislature intended that the jury in each case should determine what conduct on the part of a driver constitutes willful misconduct. In the present case the jury has found that Starling's actions constituted willful misconduct. There is substantial evidence in the record to sustain the jury's findings. By a reversal of the judgment the court substitutes its own view of the evidence for that of the jury.



11 Cal.App.2d 137

READ et al. v. MORTGAGE GUARANTEE CO. et al.

TITLE INS. & TRUST CO. v. MAYELL et al.

Civ. 9989.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1936.

1. Usury ⇐103

Owner of apartment in "own-your-own" apartment building, who assumed proportionate share of trust deed loan on premises as part of purchase price of apartment, *held* estopped to set up claim of usury against promoters of apartment project or purchaser at foreclosure sale.

2. Fraud ⇐47

Complaint for fraud by owner of apartment in "own-your-own" apartment building alleging that cost of project was misrepresented *held* insufficient where no damages were alleged.

3. Fraud ⇐58(1)

Evidence that owner of apartment in "own-your-own" apartment building was mere purchaser *held* not to entitle him to recover secret profits allegedly made by promoters on theory that promoters were trustees for owners of apartments.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Action by Mattie Read and others against the Mortgage Guarantee Company and others, wherein the Title Insurance & Trust Company, as trustee under Trust No. B–7298, Series 111, filed a complaint in intervention against plaintiffs and others. From a judgment denying relief to plaintiffs and granting relief to the intervener, plaintiffs and other persons named as defendants in complaint in intervention appeal.

Affirmed.

Bryan & Bowen, John M. Bowen, and Charles M. Easton, all of Los Angeles, for appellants.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondents Mortgage Guarantee Co. and Bond Inv. Co.

Earl E. Johnson, Ralph H. Spotts, Lawrence L. Otis, and Arch H. Vernon, all of Los Angeles, for respondent Title Ins. & Trust Co.

Hanna & Morton, of Los Angeles, for respondent Lionel V. Mayell.

SPENCE, Justice.

Plaintiffs, as apartment owners in an "own-your-own" apartment building, filed their "complaint for damages for fraud and usury." They attempted to bring the action for the benefit of all of the apartment owners. The complaint and attached exhibits are very voluminous covering 170 pages of the clerk's transcript. In the first count, plaintiffs attempted to set forth a cause of action sounding in fraud. Plaintiffs alleged in said first count that defendants had misrepresented the cost of the project and that the entire transaction was a subterfuge to evade the usury laws. In the second count, plaintiffs incorporated by reference all the allegations of the first count and then charged usury. In the third count, the allegations of the first count were again incorporated by reference and plaintiffs then alleged that defendants had made secret profits out of the transaction and that said secret profits belonged to the plaintiffs and other apartment owners. Plaintiffs did not seek rescission, nor did they seek damages. They sought to have the loan on the property declared usurious and to have the deed of trust securing said loan declared null and void except as to such amount as might be found to be justly due. They further sought an accounting of all transactions between defendants in the purchasing of the land and erecting the apartment building and for a judgment requiring defendants to pay over the alleged secret profits for the benefit of the apartment owners. In addition, plaintiffs sought to enjoin defendants from proceeding with any sale under said deed of trust.

While the above-entitled action was pending, a foreclosure sale was had under the deed of trust. Plaintiffs then filed a supplemental complaint seeking to have said sale declared null and void upon the grounds stated in the complaint. Thereafter the Title Insurance & Trust Company filed its complaint in intervention. It sought thereby, as purchaser at the foreclosure sale, to quiet title to the property and also sought, as assignee of the note and chattel mortgage upon the furnishings in said apartment building, to foreclose said chattel mortgage. The cause was tried by the court sitting without a jury upon the above-mentioned pleadings and the answers thereto. There were amendments filed to the complaint, but we shall refer to the original complaint and all of the amendments as the "complaint."

Certain evidence was introduced and certain stipulations were entered into at the time of the trial, but the trial court sustained the objections of defendants to the introduction of any evidence in support of the allegations of the complaint upon the ground that the facts alleged were insufficient to constitute a cause of action. The trial court also sustained similar objections to the evidence offered in support of similar allegations made by plaintiffs and others in their answers to the complaint in intervention. The trial court therefore entered judgment denying any relief to plaintiffs and granting relief to the intervener in accordance with the prayer of the complaint in intervention. From this judgment, plaintiffs and other persons named as defendants in the complaint in intervention have appealed.

The main question raised on this appeal is whether plaintiff's complaint was sufficient to constitute a cause of action. Other questions are discussed in the briefs, but if plaintiffs' complaint was insufficient, the answers to the complaint in intervention were likewise insufficient and, in that event, the rulings of the trial court were correct and the judgment should be affirmed.

It is appropriate to set forth briefly the general plan under which this apart-

ment house was erected and sold as disclosed by the complaint. The project was conceived and carried out largely through the efforts of defendant Mayell. The land upon which the apartment building was constructed was previously owned by L. Y. Cooper and Effie B. Cooper. The defendants Kinne and Westerhouse were the contractors who constructed the building. The Coopers conveyed the land to defendant Mayell and in 1927 said defendant arranged with defendants Kinne and Westerhouse for the construction of the apartment building and also arranged with defendant Mortgage Guarantee Company for a construction loan. This loan was evidenced by defendant Mayell's note in the sum of $1,100,000 and a deed of trust was given by defendant Mayell to secure the same. Defendant Mayell then conveyed his remaining interest in the property to defendant Western Trust & Savings Bank and said bank executed a declaration of trust for the benefit of such persons as might thereafter purchase or otherwise acquire apartment owner's certificates of beneficial interest in said trust. The bank then made application to the commissioner of corporations for a permit to issue all of the "certificates of beneficial ownership" to the Coopers, the defendant Mayell, and the defendants Kinne and Westerhouse. The permit was granted and all of the certificates were issued in varying amounts in accordance with the permit to said five persons last named. The total face value of all said certificates was $2,750,000. Each of said certificates represented the "ownership" of a specified apartment. These certificates were sold to plaintiffs and others in 1928 and each of the purchasers agreed to pay his proportionate share of the $1,100,000 loan on the premises to which his apartment was subjected by the terms of the declaration of trust. Such proportionate share was deducted from the purchase price of each apartment.

The action was commenced by plaintiffs in 1932. The complaint was subsequently amended to allege that the action was also brought on behalf of defendant Western Trust & Savings Bank, as trustee, and that said bank was joined as a party defendant because it refused to bring the action. Plaintiff also amended so as to eliminate all charges of fraud, usury, and obtaining secret profits as against said defendant bank.

A reading of the complaint shows that plaintiffs' claim to relief was based essentially upon the charge that while the $1,100,000 note provided for interest at the rate of 7 per cent., the loan was usurious in its inception as the full amount of the loan did not go into the property and upon the further charge that the defendants falsely represented the cost of the property and the actual amount advanced on the loan. The charge of usury was based upon the allegations that certain deductions for commissions were made by defendants from the amount advanced upon the loan and also that a portion of the proceeds of the loan was used to acquire certain other real property of the value of $200,000 for defendant Mayell.

Before giving consideration to the sufficiency of the complaint, it may be stated that the parties stipulated on the trial regarding the disposition of the proceeds of $1,100,000 loan. This stipulation was entered into by defendants without waiving their objection to its admissibility upon the ground that the complaint and answers to the complaint in intervention were insufficient. Upon the figures found in the stipulation of the parties, defendants contend that the loan was not usurious under the test established in Lewis v. Pacific States Savings & Loan Co., 1 Cal. (2d) 691, 37 P.(2d) 439. Defendants further contend that as the stipulation showed that the loan was not usurious, the judgment should be affirmed under section 4½, article 6 of the Constitution, even if the trial court erred in its rulings relating to the sufficiency of the pleadings. No reply has been made to these contentions, but as we find no error in the trial court's rulings, we need not discuss further the question of whether the judgment might be affirmed even if such rulings were erroneous.

[1] It is the contention of plaintiffs that each of the three counts of their complaint stated a cause of action and that the trial court therefore erred in excluding evidence in support of the allegations of the complaint. In our opinion, plaintiffs' contention may not be sustained. It is somewhat difficult to consider each of the three counts separately as the allegations of the first count were incorporated by reference into the second and third counts, and while the main charge of usury is found in the second count, reference is made to the alleged usurious nature of the transaction in the first count. We will therefore first

consider the charge of usury in the complaint without reference to particular counts. In discussing said complaint, we will refer to "defendants" as those defendants named in the complaint other than defendant Western Trust & Savings Bank, as plaintiffs withdrew all charges against said defendant bank by the amendments above mentioned. Assuming, without deciding, that plaintiffs' complaint was sufficient to charge usury in the making of the $1,100,000 loan to defendant Mayell, the allegations of the complaint nevertheless showed that plaintiffs were in the position of purchasers of the property, each of which purchasers had assumed and agreed to pay his proportionate share of said loan, which proportionate share had been deducted from the purchase price paid by each purchaser. In other words, plaintiffs' position is in all respects similar to that of a person who purchases real property and, as part of the purchase price, assumes and agrees to pay an existing encumbrance thereon. Under such circumstances, the purchaser is estopped to deny the validity of such encumbrance. Ames v. Occidental Life Insurance Co., 210 Cal. 271, 291 P. 182; Esposti v. Rivers Bros., Inc., 207 Cal. 570, 279 P. 423; Matthews v. Ormerd, 140 Cal. 578, 74 P. 136; Patten v. Pepper Hotel Co., 153 Cal. 460, 96 P. 296; Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 P. 27; State Finance Co. v. Moore, 103 Wash. 298, 174 P. 22; Selby v. Sanford, 7 Kan.App. 781, 54 P. 17; United States Bond & Mortgage Co. v. Keahey, 53 Okl. 176, 155 P. 557, L.R.A. 1917C, 829; Foy v. Armstrong, 113 Iowa, 629, 85 N.W. 753; note Ann.Cas. 1914A, page 185. As was said with respect to the claim of usury in Ames v. Occidental Life Ins. Co., 210 Cal. 271, at page 273, 291 P. 182, 183, "It is a settled holding of this court that the purchaser of an equity of redemption in real property incumbered with a prior lien may not raise the question of the usurious character of said prior transaction." We therefore conclude that plaintiffs were not entitled to raise the question of usury in support of their claims for relief.

[2] We are also of the opinion that the allegations of fraud, as contained in the first count and incorporated by reference into the second and third counts, were likewise insufficient. While plaintiffs alleged that defendants had misrepresented the cost of the project, there was not a single allegation showing damage of any kind. The general rule is well established that a person is not entitled to any relief upon the ground of fraud unless damages are alleged and proved (12 Cal.Jur. p. 813), and we find nothing in the pleadings which would bring plaintiffs within any exception to the general rule. Furthermore, this action was brought more than three years after plaintiffs purchased their apartments and plaintiffs' attempt to plead facts tolling the statute of limitations was insufficient under the rules set forth in Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268.

[3] The third count of the complaint, incorporating the allegations of the first count by reference and then alleging that defendants had made secret profits, is also insufficient. It was upon the allegations of this count that plaintiffs sought an accounting of the alleged secret profits. Plaintiffs' theory seems to be that defendant "Mayell was a trustee of an express trust" and that defendants were therefore not entitled to make any secret profits at the expense of the purchasers. In our opinion, the complaint and attached exhibits show that the relationship created by plaintiffs' purchases of their apartments from defendant Mayell and others was the conventional vendor and vendee relationship. Defendant Mayell was the trustor in the loan transaction and was also the trustor when conveying his remaining interest to the Western Trust & Savings Bank. When said bank issued the "certificates of beneficial ownership" to defendant Mayell and others, said persons became beneficiaries under the trust agreement. When said persons sold said "certificates of beneficial ownership" to plaintiffs, the parties dealt at arm's length. It appears that neither defendant Mayell nor any of defendants from whom plaintiffs purchased their apartments bore any fiduciary relationship whatever toward plaintiffs. Plaintiffs were therefore not entitled to an accounting nor to the benefits of the profits, secret or otherwise, which were realized by defendants.

It follows from what has been said that the trial court correctly excluded evidence in support of the allegations of the complaint and of the answers to the complaint in intervention as said pleadings were insufficient.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

11 Cal.App.2d 335

SALVETER v. SALVETER et al.

Civ. 10785.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1936.

1. Execution ⇐6

Writ of execution must be founded upon a valid and subsisting judgment.

2. Judgment ⇐887

Payment of a judgment satisfies and extinguishes it.

3. Pleading ⇐214(3)

Complaint in husband's suit against wife for equitable relief, alleging divorce, wife's retention of husband's property in excess of alimony order, wife's fraudulent obtaining of execution on order, and subsequent execution, sale *held* good as against demurrer, since demurrer admitted husband's allegations of compliance with alimony order, and order to issue execution was therefore a nullity as based upon a satisfied order.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Harry D. Salveter against Mary E. Salveter and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Goodspeed, Pendell & McGuire, of Los Angeles, for appellant.

CRAIL, Presiding Justice.

This is an appeal from a judgment entered against the plaintiff after an order sustaining a demurrer to plaintiff's complaint without leave to amend.

It is alleged in the complaint that the plaintiff and defendant were formerly husband and wife, and that during the period of their marriage they acquired a ninety-nine year interest in certain real property known as the "market lease"; that subsequently the defendant sued the plaintiff for divorce; that the court granted a divorce to the defendant and adjudged the market lease to be community property which should be equally divided between them, but the division was to be postponed until the further order of the court; that, pending the trial of the divorce action, defendant obtained an order of court requiring plaintiff to pay defendant for her support the sum of $20 per week; that, during the pendency of said action, a period of two years and one month, defendant collected the rentals from said market lease, amounting to a sum in excess of $12,000, which she kept and used for her own benefit, and that the plaintiff had paid to the defendant by and through said rentals all sums required to be paid to her under or by reason of said order for $20 per week, and that there was nothing owing to her by the plaintiff on said order at any time; that, after the final decree of divorce, the defendant, for the purpose of defrauding plaintiff, made an ex parte application to the court for a writ of execution on said order accompanied by an affidavit falsely stating that the sum of $2,068 was unpaid to her under said order of court, and that the execution was issued although there was no money owing to the defendant on said order at any time; that the plaintiff's interest in said market lease was sold under said execution to the defendant; that all of said proceedings were taken without any sort of notice to the plaintiff and without plaintiff having any knowledge whatever concerning the same; that the other defendants claiming to have acquired any interest in the leasehold acquired the same with full knowledge of said facts. Plaintiff prays for equitable relief under said allegations.

At the hearing of the demurrer, the only contentions of defendant as grounds for sustaining the demurrer were that the complaint showed on its face that the fraud complained of was an intrinsic fraud; that the order made for the issuance of such execution was an appealable order and, as there had been no appeal taken therefrom by the plaintiff, the same was "res judicata" that the money was owing to this defendant.

[1-3] The so-called order to issue an execution was not a judgment on the merits against the plaintiff. It was by the allegations of the complaint a direction by the court to its clerk to issue the execution. It is a fundamental rule that a writ of execution must be founded upon a valid and subsisting judgment which has not been satisfied. 11 Cal.Jur. 43, and cases cited. Payment of a judgment satisfies it and extinguishes it. 15 Cal.Jur. 269, and cases cited. The demurrer admits that the order was complied with by payment in full. Under the facts and cir-

cumstances which are alleged by the plaintiff and admitted by the demurrer, the order upon which the execution was issued was, from the standpoint of a chancellor, satisfied and therefore a nullity. Since a sale of the property to the defendant had been made under the execution, a motion to quash the execution no longer would be adequate, and the plaintiff was entitled to equitable relief. 11 Cal.Jur. 63, and cases cited.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



11 Cal.App.2d 150

BREMNER v. ALAMITOS LAND CO. et al.

Civ. 10003.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1936.

1. Vendor and purchaser ⇐145

Where land company failed to execute deed for realty purchased by improvement company and grantee of trustees of improvement company obtained judgment quieting title to lot conveyed to him, purchaser from grantee could compel land company to execute deed to property, notwithstanding grantee's deed from trustees was not authorized by court order (Civ.Code, § 400, as amended by St.1917, p. 380).

2. Vendor and purchaser ⇐145

Purchaser from grantee of realty company could as "successor" in interest of realty company and "owner" of property compel realty company's vendor to execute deed, notwithstanding purchaser had no deed thereto.

Word "successor" has twofold meaning and applies to one entitled to succeed as well as to one who has already succeeded.

[Ed. Note.—For other definitions of "Owner" and "Successor," see Words & Phrases.]

3. Vendor and purchaser ⇐145

Land company, failing to execute deed to improvement company for realty purchased under executory contract, *held* legal owner of realty entitling successor in interest of improvement company to conveyance of realty.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by M. Herminia Bremner against the Alamitos Land Company, E. M. Shannon, and others. From a judgment for plaintiff, defendant E. M. Shannon appeals.

Affirmed.

Rutan & Mize, of Santa Ana, and Erwin H. Haas, of Los Angeles, for appellant.

Rex Hardy, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to have a trust in certain lands declared in her favor. The defendants answered. A trial was had before the court sitting without a jury. The court made a decree as prayed, and one of the defendants has appealed.

On November 7, 1904, the Alamitos Land Company owned a large tract of land in the county of Los Angeles. On that date it executed an executory contract of sale of a portion of said land to Signal Hill Improvement Company. The purchase price was $28,000 together with accrued interest, and was payable in installments. Possession was immediately given to the purchasers who entered, subdivided, mapped, recorded the plat, and made numerous sales thereunder. After entering, Signal Hill Improvement Company also laid out streets and graded the same. Under its contract Signal Hill agreed to pay all taxes and assessments after the date of its contract of purchase. On or before July 18, 1907, the purchaser or its assigns had made each and all of the payments due under the contract of purchase. No conveyance of block 2 of Signal Hill, the property involved in the instant case, was ever made by said Alamitos Land Company. On November 30, 1910, Signal Hill Improvement Company forfeited its charter because of nonpayment of license taxes. Under the statute as it then stood, the directors then in office became the trustees to liquidate said corporation. Certain vacancies having arisen, upon petition duly presented, the superior court appointed other trustees, thus filling all vacancies. That decree was entered January 3, 1930. Thereafter, on January 16, 1930, said trustees so appointed executed a quitclaim deed to block 2 to William P. Maurer. Thereafter, in an action to quiet title, a judgment was entered in favor of

Maurer against the trustees. In that action no defendants were named except said trustees. On July 5, 1930, Maurer conveyed the land in suit to this plaintiff. From the date of said contract of purchase, November 7, 1904, down to the present time, the plaintiff and her grantors have been in possession. On February 15, 1932, in an action to quiet title in which E. M. Shannon was the plaintiff and Alamitos Land Company was a defendant, but in which this plaintiff was not a defendant, a decree was entered in favor of E. M. Shannon and against Alamitos Land Company. In the instant case, the trial court, having made findings in effect reciting the foregoing facts, prepared conclusions of law as follows: "By the agreement of sale of November 7, 1904, Signal Hill Improvement Company, a corporation, became the equitable owner of said property. When the full purchase money under said agreement of sale was paid to Alamitos Land Company on or about July 18, 1907, it became and remains the holder of the bare legal title to said property, but as trustee to convey same to or for the account of Signal Hill Improvement Company or its successor in interest. The plaintiff herein is the sole and exclusive successor in interest of Signal Hill Improvement Company. The defendant Shannon herein never had and has not now any legal or equitable title in or to said property. The plaintiff is entitled to receive a grant deed duly executed and acknowledged by Alamitos Land Company, a corporation, conveying to the plaintiff the legal title to said property subject to all liens and encumbrances of record, thus merging the legal and equitable titles to said property."

[1] The defendant Shannon claims the deed to Maurer was invalid because no order of court was obtained permitting the trustees of Signal Hill Improvement Company, a defunct corporation, "to make sales." It is contended that such an order was necessary. Civ. Code, section 400, as amended by ch. 216, p. 380, Stats. 1917. Assuming solely for the purposes of determining this claim that said deed was invalid, nevertheless Maurer held a decree quieting his title against Signal Hill Improvement Company. Said decree was valid and the validity of the deed becomes immaterial. In the quiet title proceeding Maurer could have named both Alamitos Land Company and Signal Hill Improvement Company as defendants and thus wholly cleared his title. He named only the latter as a defendant and as to it his decree was valid. This plaintiff, his grantee, has in this action named Alamitos Land Company as one of the defendants and has asked for the balance of the relief which Maurer could have asked for. We see no infirmity in the procedure.

[2] In her complaint this plaintiff alleged, and the trial court found, that she was the "successor in interest of said Signal Hill Improvement Company and the owner" of the property in suit. The defendant asserts that under the facts said finding finds no support. He bases that assertion on the fact that the plaintiff held no deed. But that contention places meanings on the words "successor" and "owner" that are too narrow and which are not sustained by the authorities. The word "successor" has a twofold meaning. It may be used in the sense of one entitled to succeed as well as in the sense of one who has in fact succeeded. People v. Ward, 107 Cal. 236, 239, 40 P. 538. The word "owner" has no rigid meaning. 50 C. J. 770. We think both words, "successor" and "owner," clearly cover the claim asserted by this plaintiff.

[3] The last claim made by this defendant is that the judgment that the Alamitos Land Company is the legal owner of the land is contrary to the findings. We think that claim is also without foundation. Said company never executed a deed to any person. The judgment in favor of this defendant in his quiet title suit was conclusive as to the defendants named in that suit. This plaintiff was not a party to and was not bound by the judgment in that suit.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

11 Cal.App.2d 204

TOROSIAN et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 1760.

District Court of Appeal, Fourth District, California.

Jan. 10, 1936.

Hearing Denied by Supreme Court March 9, 1936.

Master and servant ⊂⇒375(1)

Where, in washing wheels of truck preparatory to repainting, small quantities of gasoline had been spilled on pavement, and when about through employee offered coemployee cigarette, and while lighting cigarettes employee and coemployee engaged in friendly scuffle, injuries received by employee from burns caused by ignition of gasoline from match thrown by employee *held* compensable as "arising out of and in course of employment."

[Ed. Note.—For other definitions of "Arising out of Employment" and "Course of Employment," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by Benjamin Higashi, employee, opposed by A. J. Torosian and another, doing business as Torosian Brothers, employers. To review and have annulled an award of the Industrial Accident Commission in favor of employee, employers filed petition to review.

Award affirmed.

Smith, Southwell & Smith, Hebard Smith, and R. P. Wisecarver, all of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

Petitioners seek to have annulled an award of the Industrial Accident Commission in favor of respondent Benjamin Higashi.

Higashi, with another employee of the petitioners, was assisting one of the petitioners in washing the wheels of a truck preparatory to repainting the same. In doing this work a small can of gasoline had been used and small quantities of gasoline had been spilled on the pavement. When they were about through with this work, Higashi offered the other employee a cigarette and took one himself. He struck a match, lit the other cigarette, and then lit his own. While lighting the other cigarette Higashi drew the match slightly away so that the other employee had to follow the flame in order to get a light. Shortly thereafter the other employee punched Higashi in a friendly way and Higashi punched or shoved back in the same spirit. At some time during this proceeding Higashi dropped the match, which ignited the gasoline on the pavement, and the flame spread. Higashi kicked over the quart can of gasoline, thereby splashing portions of it on his trousers, which ignited and burned him, causing the injuries in question.

The respondent commission found that the injuries to Higashi arose out of and in the course of his employment and made a special finding as follows: "Although the applicant and a co-worker had, immediately preceding said injury, engaged in playful acts, said injury was not proximately caused by said playful acts, but it, the said injury, was proximately caused by the applicant's discarding of a burning, or partially burning match, with which he, the applicant, had lit a cigarette for himself and said co-worker, which match fell to the ground and ignited gasoline, which gasoline had fallen there while the applicant and said co-worker were doing work in the course of their employment." The petitioners contend that these findings are entirely without support in the evidence and that it conclusively appears that Higashi suffered these injuries as a result of his own "skylarking" or "horseplay" and that, therefore, the injury did not arise out of and in the course of his employment.

Petitioners particularly rely on the case of Dalsheim v. Industrial Acc. Comm., 215 Cal. 107, 8 P.(2d) 840, which is claimed to be almost analogous to the instant case. In that case the employee intentionally tossed a piece of burning paper into a bucket of cleaning fluid for the purpose of frightening a fellow employee. It was there held that this act constituted a complete departure from the employment and that this act, outside of the scope of the employment, caused the injury.

The situation here is somewhat different. There was no intentional lighting of the gasoline. It does not even appear that Higashi was aware that any of the gasoline was on the pavement. The dropped match which ignited the gasoline was lighted in the process of smoking, a per-

missible act which was not, in itself, a departure from the scope of the employment. The scuffling occurred after the match was lit and, whether it preceded or followed the dropping of the match, the same could not be said with any certainty to have been alone responsible for the ignition of the gasoline. The original lighting of the match was done within the scope of the employment, and it does not conclusively appear that the dropping of the match and the subsequent injury was proximately caused by the subsequent scuffling, even if it could be said that the latter constituted a definite departure from the employment. If the match was dropped before the playful blows were exchanged, they had nothing to do with the injury. If it was dropped during the scuffling, these acts may have had something to do with the injury, but the injury was still connected with the act of lighting the match which originated in the course of the employment. It cannot, therefore, be certainly said that the injury arose by reason of an act which was entirely apart from the scope of the employment.

Not only is no clear-cut distinction possible whereby it may be positively said that the injury arose out of a departure from the employment but the evidence justifies an inference, at least, that the match was dropped before the scuffling began. Higashi testified as follows:

"Q. How did the accident happen? A. We were just about through washing the wheels; in fact, we were both working on the last wheel. After we finished we both lit a cigarette. I had the match in my hand and after I lit his cigarette I lit mine and dropped the match on the pavement there.

"Q. And was there gasoline on this pavement? A. Yes, around there.

"Q. And that became ignited? A. Yes.

"Q. And you suffered burns of your leg, is that correct? A. Yes. * * *

"A. Why, I remember offering him a cigarette and I took one myself, and naturally I struck the match and when he was trying to get the cigarette lit, I drew the match away, and naturally he had to follow the flame. I finally let him have the light, lit mine, and while doing that he just punched me and I punched back. I don't know exactly what occurred there, but I know I dropped the match on the pavement.

"Q. Do you recall having the match in your hand when you were fooling with each other, or was that fooling done after? A. I believe I threw the match down before we started."

Assuming that other inferences from the evidence are possible, it cannot be said that they must necessarily be drawn therefrom. The question was one of fact for the commission, and the evidence, with inferences that might reasonably be drawn therefrom, supports the findings made.

The award is affirmed.

We concur: MARKS, J.; JENNINGS, J



11 Cal.App.2d 305

SHADDOCK v. MEDOFF.

Civ. 10455.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

1. Limitation of actions ⇐31

Actions for alienation of affections are subject to one-year limitation (Code Civ. Proc. § 340, subd. 3).

2. Limitation of actions ⇐197(1)

Evidence *held* to establish that separation had occurred and that wife had known and believed husband's affections had been alienated more than one year before she filed action for alienation of affections; hence action was barred by one-year limitation (Code Civ.Proc. § 340, subd. 3).

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Jennie Shaddock against Etta Medoff. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

David Schwartz, of Los Angeles, for appellant.

Milton M. Cohen, of Los Angeles, for respondent.

⇐ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ROTH, Justice pro tem.

[1, 2] This is an appeal by appellant from a judgment of nonsuit entered against her in an action for alienation of affections. The judgment of nonsuit entered on the court's own motion was granted on the ground that the evidence adduced by appellant impelled the conclusion that her action was barred by the statute of limitations; appellant having failed to file the same for more than one year after the accrual of her cause of action. It appears to be the rule in this state that the one-year period of limitation applies to actions for alienation of affections. Code Civ. Proc. § 340, subd. 3; Harp v. Ferrell, 115 Cal.App. 160, 300 P. 978; Davis v. Conant, (Cal.App.) 51 P.(2d) 151; Mohn v. Tingley, 191 Cal. 470, 471, 217 P. 733. We are convinced that a different conclusion from that made by the trial court cannot be drawn from the evidence. The uncontroverted evidence shows that appellant knew and believed that her husband's affections had been stolen from her in June of 1932, and that a separation actually occurred between appellant and her husband in August, 1932. The instant action was filed January 25, 1934. The following excerpt from the testimony indicates the reason for the delay in bringing of the action:

"The Court: You knew it in 1932? A: Yes, right along I knew.

"The Court: If you wanted to sue this defendant for damages for alienating your husband's affections why did you wait until the 25th of January, 1934, to commence your action? A: Well, I thought he would come back home."

Appellant also testified that her husband "took his things and got out of (the) house" in August, 1932, and did not establish a home for her after that date. The record also discloses that on February 3, 1933, appellant herein as plaintiff filed an action for divorce and alleged in her complaint for divorce that the date of separation was August 3, 1932. The evidence also shows that appellant's husband, commencing with August 3, 1932, remained away from the house, first once a week, then twice a week, and finally three or four nights a week. However, appellant insisted in some of her testimony that she and her husband actually lived together as husband and wife until December 25, 1932. This is partially borne out by a letter written to appellant by her husband in October of 1932, at a time when the appellant's husband was out of the city, in which letter he said in part as follows: "With love to you and the folks and wishing you and the folks a very happy and prosperous New Year, I remain, your hubby Joe."

Accepting all of appellant's statements as the truth and for their full value, there is still no evidence of any kind indicating that the parties lived together intermittently or otherwise as husband and wife, or in any other manner, after December 25, 1932. The foregoing résumé of facts justifies but one reasonable conclusion, and that is that the parties did separate and the cause of action accrued prior to the 25th day of January, 1933. Since the action was not filed until January 25, 1934, it is clear that the statute of limitation had already run.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 200

MEDICO-DENTAL DISCOUNT CORPORATION v. TITLE INSURANCE & TRUST CO.

Civ. 10760.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1936.

1. Mortgages ⇐21

Power of sale in trust deed *held* not voidable although not preceded by proceedings to foreclose (Civ.Code, § 2924).

2. Mortgages ⇐113

That beneficiary and trustee were the same did not invalidate deed of trust.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the Medico-Dental Discount Corporation against the Title Insurance & Trust Company. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Black, Hammack & Black, by Alfred L. Black, Jr., all of Los Angeles, for appellant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

R. Dechter and M. J. Finkenstein (by R. Dechter), both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendant after the trial court sustained a demurrer to plaintiff's second amended and supplemental complaint without leave to amend.

The complaint as amended alleged the execution of a trust deed as security for the payment of a promissory note and that the creditor and trustee named in the deed of trust were one and the same person; and prayed that a sale held pursuant to the terms of the trust deed be declared void.

Plaintiff relies for reversal of the judgment on the following propositions:

First. A power of sale in a trust deed is voidable in view of section 2924 of the Civil Code, unless preceded by proceedings to foreclose, as in the case of a mortgage.

Second. A valid trust deed does not exist where the beneficiary and trustee are one and the same party.

[1] Plaintiff's first contention is untenable, in view of the holding in Kinard v. Kaelin, 22 Cal.App. 383, at page 392, 134 P. 370, 374, where Mr. Presiding Justice Lennon, in disposing of a similar contention says: "Finally, an attack is made upon the legality of deeds of trust. In this behalf it is urged that the power of sale usually granted in such instruments, and appearing in the deed of trust in controversy here, is voidable and legally nonavailable unless preceded by proceedings to foreclose, as in the case of an out and out mortgage. In short, it is the plaintiffs' contention that the deed of trust in question must, as a matter of law, be construed and considered as a mortgage with all of the rights, incidents, and obligations thereof. Practically this same point was presented 14 years ago in the case of Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813, and there finally and definitely decided adversely to the contention made by the plaintiffs here. The decision in that case has never been overruled, modified, or criticized. On the contrary it has since been continuously adhered to, and it stands to-day as the settled law of this jurisdiction."

See, also, Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.(2d) 940; 25 California Jurisprudence, page 6, § 2.

[2] The second proposition presented by plaintiff is answered adversely to its contention by Kinard v. Kaelin, supra, 22 Cal. App. 383, at page 391, 134 P. 370, 374, where the court says: "Neither of these contentions is tenable. The fact that the trustee designated in a deed of trust may have an interest in the sale of the property secured thereby does not incapacitate such trustee from acting, nor, in the absence of a showing of fraud, irregularity or misconduct on the part of such trustee, invalidate a sale made under the terms of the deed of trust. *In fact, the creditor himself may rightfully act as such trustee, and may properly purchase at his own sale.*" (Italics ours.)

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 63

KATENKAMP et al. v. UNION REALTY CO.

Civ. 5540.

District Court of Appeal, Third District, California.

Dec. 27, 1935.

Hearing Denied by Supreme Court Feb. 24, 1936.

1. Appeal and error ⇐901

Plaintiff declining to amend after general demurrer was sustained must show complaint was not defective in any of particulars specified in demurrer.

2. Navigable waters ⇐41(1)

Complaint for damages for transfer of sand from ocean beach to border of adjoining land as result of defendant's maintenance of groin *held* not demurrable for failure to allege date when damages accrued.

3. Evidence ⇐8

Court will take judicial notice that process of transferring sand from ocean beach to border of land on opposite side of groin is gradual.

4. Navigable waters ⇐41(1)

Maintenance of groin for purpose of transferring sand from ocean beach to border of land on opposite side of groin was "continuing nuisance."

[Ed. Note.—For other definitions of "Continuing Nuisance," see Words & Phrases.]

5. Limitation of actions ⇐32(1)

Alleged transfer of sand from ocean beach to border of adjoining land was not a "trespass" but a "taking and damaging of easement in realty," suit for compensation of which could be commenced within five years thereafter (Code Civ.Proc. § 336).

[Ed. Note.—For other definitions of "Trespass," see Words & Phrases.]

6. Navigable waters ⇐41(1)

State of California *held* not "necessary party" defendant in action for damages for transfer of sand from ocean beach to border of adjoining land by constructing groin.

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

7. Navigable waters ⇐41(1)

Under common enemy doctrine, person cannot erect groin on his property to secure asportation of ocean beach of neighbor's property for improvement of his own lands (Civ.Code, § 3514).

8. Navigable waters ⇐41(1)

Owner of land adjacent to sea cannot unnecessarily adopt measures to protect his own land which will destroy neighbor's land (Civ.Code, § 3514).

9. Navigable waters ⇐41(1)

In action for damages for transfer of sand from ocean beach to border of adjoining land by constructing groin, whether groin was constructed for protection from inroads of sea, or for mere improvement of property *held* for trier of fact.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Suit by J. F. Katenkamp and others against the Union Realty Company. From the judgment, plaintiffs appeal.

Reversed with directions.

See, also, 53 P.(2d) 390.

Robertson, Crawford & Nichols, of Santa Barbara, for appellants.

Heaney, Price & Postel, of Santa Barbara, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment which was rendered against them for failure to amend their complaint within the time allowed therefor after a demurrer had been sustained on the ground that it fails to state facts sufficient to constitute a cause of action.

This suit was filed February 15, 1933, for separate damages alleged to have been sustained by the several plaintiffs who joined in this cause of action under the provisions of section 378 of the Code of Civil Procedure. It is alleged the plaintiffs are the owners of separate contiguous tracts of land bordering on Miramar Bay, an inlet of the Pacific Ocean, at Santa Barbara, with appurtenant sandy beaches connected therewith 100 feet in width above the water line and extending into the bay a further distance of 500 feet beyond the ordinary high-water mark; that the beaches were improved by the construction of bath houses and otherwise and constituted valuable assets to their respective properties; that the defendant owns a tract of land littoral to the same bay adjoining the properties of the plaintiffs on the westerly side thereof, the shore line of which was barren, rocky, and devoid of sand or beach; that about June 1, 1929, "solely for the purpose of securing the accretion of sand to its shore and upon its property and thereby to create a sandy beach and shore to the front of and upon its said property defendant * * * built upon the easterly line of its said property a certain structure known as a groin or wall," across the width of plaintiffs' beach and "into said water a distance of approximately 75 feet," which structure was intended to and did result in destroying and diverting the entire beach from plaintiffs' property leaving that space barren, rocky, and devoid of sand, by changing the natural flow of the tides, currents, and waves of the bay in that vicinity, and by depositing the sand along the margin of defendant's adjoining land so as to create a sandy beach thereon, to the great damage of plaintiffs' properties in the respective amounts specified. To this complaint the defendant demurred on the grounds that it fails to state facts sufficient to constitute a cause of action, that the state of California is a necessary party defendant for the reason that the state by statute and by law has the sole control over the construction, operation, and maintenance of all groins, and structures on or over tidewater lands owned by the state, and that the complaint is uncertain, ambiguous, and unintelligible regarding the time when the alleged damages occurred. The demurrer was sustained and the plaintiffs were allowed ten days in which to amend. They failed to amend their pleading and judg-

ment was accordingly rendered against them. From that judgment, the plaintiffs have appealed.

[1] The demurrer was sustained without specifying any particular ground therefor. Since the appellants declined to amend their pleading, the general order of the court sustaining the demurrer is sufficient and on appeal places the burden on them to show that the complaint was not defective in any of the particulars specified in the demurrer. Gutterman v. Gally, 131 Cal. App. 647, 650, 21 P.(2d) 1000.

[2-5] We are of the opinion the complaint is not subject to demurrer on the ground that it fails to specify the exact date upon which the alleged damages accrued. It is recited that the groin was constructed "about the 1st day of June, 1929," and that the structure resulted in diverting the natural flow of the tides, currents, and waves of the bay in that vicinity so as to take and destroy the beaches adjacent to plaintiffs' land and transfer the sand therefrom to the border of defendant's land. Common knowledge teaches one that the process of transferring sand from a beach to the border of land on the opposite side of a structure maintained under the circumstances alleged in the complaint would necessarily be gradual. The court will, therefore, take judicial notice of that fact. The maintaining of a groin under such circumstances will be in the nature of a continuing nuisance. The acts complained of result in an alleged taking and damaging of an easement in real property as distinguished from a trespass thereon, and a suit for the compensation of which may be commenced under the provisions of section 336 of the Code of Civil Procedure within five years thereafter. It is said in the case of Martin v. Western States Gas & Electric Co. (Cal.App.) 47 P.(2d) 522, 524, in which a hearing was denied by the Supreme Court regarding the right to sue for damages for the taking of water from a river upon which the plaintiffs' land was riparian, that the appropriation amounts to a "taking and damaging of the real property * * * as distinguished from a mere trespass * * * on [an] interest in the land," and that an action for damages therefor is not barred prior to the expiration of five years thereafter, which time is necessary to elapse before title may be claimed by adverse possession. Moreover, the defense of the statute of limitations was not pleaded in the present action.

[6] The state of California is not a necessary party defendant in this action. It is alleged the defendant placed the structure along the marginal portion of his land adjacent to plaintiffs' property, and thence on into Miramar Bay a further distance of 75 feet, and maintained it in that position to the detriment of plaintiffs' beach property. It does not appear that the officers of the state of California knew of the existence of this groin. This suit is a mere action against the defendant for damages for the wrongful taking of plaintiffs' beach property. It does not seek to abate an alleged nuisance or remove the structure. For mere damages resulting from the alleged wrongful acts of the defendant, the state of California is not a necessary party. We assume the demurrer was not sustained on that ground.

In support of the judgment in this case, the respondent relies on the doctrine which recognizes the right of defense against the inroads of the sea as a common enemy without liability for damages incurred as a result thereof. Rex v. Pagham Comm. etc., 8 B. & C. 360. That principle has been applied in California with reference to the necessary control of flood waters. LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Lamb v. Reclamation District No. 108, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775. The doctrine is clearly expressed in 1 Wood on Nuisances (3d Ed.) page 675, § 494, as follows:

"Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses, for the protection of his land from the inroads of the sea, although, by so doing, he may cause the sea to flow with greater violence against the land of his neighbor, and render it necessary for the latter to protect himself by the erection of similar sea defenses. 'Each landowner has a right to protect himself, but not to be protected by others, against the common enemy.' But a man has no right to do more than is necessary for his defense and to make improvements at the expense of his neighbor."

[7,8] The "common enemy" doctrine, however, affords no relief to the respondent in this case for the reason that the complaint specifically alleges that it built the groin complained of "solely for the purpose of securing the accretion of sand

to its shore," and not for defense against the inroads of the sea. In other words, it is alleged that the structure was erected by the respondent to improve his property by acquiring a sandy beach on the border thereof at the expense of the appellants and not in defense of the common enemy of the sea. The authorities in support of the "common enemy" doctrine are uniform in declaring that an owner of property may not construct or maintain structures which are detrimental to his neighbor's property, merely for the purpose of improving his own property. The application of the principle relied on by the respondent in this case is confined strictly to a necessary defense against the destruction or serious damage to one's property by the unusual forces of flood water or the inroads of the sea. One may not deliberately construct a wall or groin on his own property for the purpose of the asportation of the beach of his neighbor's property for the improvement of his own land and justify the act in the guise of the doctrine of combatting the common enemy of the sea. It is an axiom of law that one must use his own property in a manner which does not unnecessarily damage the property of others, or diminish their equal right to the full enjoyment thereof. Section 3514, Civ.Code; 20 Cal.Jur. p. 267, § 6; 1 C.J. p. 1206, § 9; 1 Tiffany on Real Property (2dEd.) p. 1117, § 335; People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183. The owner of land adjacent to the sea may not unnecessarily adopt measures for the protection of his own land which will result in the destruction of his neighbor's land. 24 Cal.Jur. p. 599, § 7; Turner v. Tuolumne County Water Co., 25 Cal. 397. In affirming a judgment for damages resulting from the flooding of plaintiffs' land by a storm of unusual severity on account of a ditch which the defendant maintained on its own land for the avowed purpose of protecting its property from flood water, the court said in the Turner Case last cited:

"While the defendant had an undoubted right to ward off from its own property the damaging effects of the storm, yet in exercising that right it was bound to take care not to injure that of the plaintiffs. The defendant had no right to adopt measures for the protection of its own property which would lead to the destruction of the plaintiffs."

[9] The reports are replete with authorities supporting the doctrine last announced. It is but the declaration of a rule of common justice. The question as to whether the owner of littoral land bordering on tidewater necessarily constructs a groin for the sole purpose of protecting his land from the inroads of the sea and not for the mere improvement of his property is primarily an issue of fact to be determined on trial from the circumstances of each particular case. The complaint in the present case clearly alleges that the respondent erected and maintains the groin in question to improve its own property by acquiring a sandy beach on its waterfront. If the structure was built for necessary protection against the inroads of the sea, that is a matter of defense which must be pleaded and proved by the respondent.

We are of the opinion the complaint states a good cause of action for damages to the lands of the plaintiffs.

The judgment is reversed and the trial court is directed to overrule the demurrer and permit the defendant to answer the complaint.

We concur: PLUMMER, J.; PULLEN, P. J.

KATENKAMP et al. v. UNION REALTY CO.*

Civ. 5441.

District Court of Appeal, Third District, California.

Dec. 27, 1935.

Hearing Granted by Supreme Court Feb. 24, 1936.

1. Mandamus ⇐3(8)

Mandamus will not lie where statute affords adequate relief.

2. Navigable waters ⇐36(1)

State of California owns tidewater lands adjacent to its seacoast below ordinary high-water mark subject to right of federal government to control foreign and interstate commerce aspects of navigation.

3. Navigable waters ⇐36(1)

State of California can regulate and control use of its tidelands for general welfare of public, subject to right of free navigation.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 473.

4. Mandamus ⇐3(8)

Mandamus would not lie to compel removal of groins from tidelands which were alleged to have transferred sand from beach to border of land on opposite side of groin where statutory remedy existed (Pol.Code, § 690.10, as amended by St.1933, p. 2373).

5. Eminent domain ⇐70

Statute authorizing removal of groins on tidelands belonging to state *held* not unconstitutional as authorizing taking of private property without compensation (Pol.Code, § 690.10, as amended by St.1933, p. 2373; Const. art. 1, § 14).

6. Constitutional law ⇐48

Court must assume constitutionality of statute which is adapted to lawful purpose and appears to be constitutional unless unconstitutionality appears on face of statute as pure proposition of law unmixed with matters of fact which must be determined on trial.

7. Constitutional law ⇐43(1)

Failure to invoke statutory remedy is waiver of right to subsequently challenge constitutionality of statute.

8. Statutes ⇐115(1)

Failure of statute authorizing littoral owners of property adjacent to state tidelands to petition for removal of groins, to refer to littoral owners did not render statute violative of constitutional requirement that subject-matter of act be expressed in title (Pol.Code, § 690.10, as amended by St.1933, p. 2373; St.1931, p. 925; Const. art. 4, § 24).

9. Statutes ⇐105(1)

Constitutional provision requiring subject-matter of statute to be expressed in title should be liberally construed so as to uphold object sought to be attained by statute if reasonably possible (Const. art. 4, § 24).

10. Statutes ⇐109

Constitutional provision requiring subject-matter of statute to be expressed in title requires only reasonably intelligent reference in title to general subject-matter of statute (Const. art. 4, § 24).

11. Constitutional law ⇐208(3)

Statute authorizing littoral owners of property adjacent to state tidelands to petition for removal of groins *held* not invalid as class legislation discriminating between littoral and nonlittoral owners (Pol.Code, § 690.10, as amended by St.1933, p. 2373).

12. Navigable waters ⇐41(1)

Owners of land littoral to ocean inlet are entitled to unobstructed access to water.

13. Constitutional law ⇐208(1)

Statute which does not apply to all individuals uniformly, but does apply to all persons of particular class is not invalid if reasonable cause exists for distinguishing selected class.

14. Constitutional law ⇐62

Legislature can delegate authority to administrative boards or officers to adopt reasonable rules and terms to carry out general purpose of statute, even though discretion is thereby conferred on boards or officers in determining such rules and terms.

15. Constitutional law ⇐62

Statute authorizing department of finance through division of state lands to permit littoral landowners to construct groins on state tidelands *held* not unconstitutional as delegating legislative authority to administrative board (Pol.Code, § 690.10, as amended by St.1933, p. 2373).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Mandamus proceeding by J. F. Katenkamp and others against the Union Realty Company. From the judgment, the plaintiffs appeal.

Affirmed.

See, also, 53 P.(2d) 387.

Leland Crawford, A. W. Robertson, and Maxwell Nichols, all of Santa Barbara, for appellants.

Heaney, Price & Postel, of Santa Barbara, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered for failure to amend a petition for a writ of mandamus within the time allowed by the court after a demurrer thereto had been sustained.

It is alleged the petitioners own separate contiguous tracts of land bordering on Miramar Bay, an inlet of the Pacific Ocean, at Santa Barbara, which included an ideal sandy beach 100 feet in width above the water line and extending into the bay a further distance of 500 feet; that this beach was improved by the construction of bath houses and otherwise and was used by the petitioners for recreation and as a means of access to the adjacent bay for bathing, boating, and fishing, for which purposes the beach was a great asset to the

value of their properties; that the respondent owns a tract of land littoral to the same bay adjoining the petitioners' property on the westerly side thereof, the shore line of which was barren, rocky, and devoid of sand or beach; that about October 1, 1929, "solely for the purpose of securing the accretion of sand * * * to create a sandy beach and shore * * * upon its said property," the respondent constructed two parallel groins at and near the easterly line of its property extending at right angles from the cliff, across the flat, a distance of 100 feet and thence onward into the bay a further distance of 100 feet; that these structures resulted in diverting the natural flow of the tides, currents, and waves of the bay in that vicinity so as to destroy the beach adjacent to petitioners' property and transfer the sand therefrom creating a beach on the margin of respondent's land. A mandatory injunction was sought to compel the respondent to remove the groins so that the natural flow of the tides, currents, and waves of the bay may restore the beach to the petitioners' property. To this petition the respondent filed a demurrer on the grounds that it fails to state a cause of action, that the state of California has the exclusive control of such structures over or upon tide water within the state, and that the petition is uncertain in various specified respects. The demurrer was sustained and the petitioners were granted ten days in which to amend their pleading. They declined to amend and judgment was rendered against them. From this judgment, an appeal was perfected.

The demurrer to the petition for a writ of mandamus was properly sustained for the reason that an adequate statutory remedy exists for the removal of groins, jetties, sea walls, breakwaters, or bulkheads from tide lands of the state by application to the division of state lands of the state of California. Section 690.10, Pol. Code, as amended by St. 1933, p. 2373. That act authorizes the department of finance, through the division of state lands, to grant the privilege to littoral landowners to construct and maintain groins, jetties, sea walls, breakwaters, and bulkheads across or upon swamp, overflowed, marsh, tide, or submerged lands of the state bordering upon such littoral lands, so long as such structures do not interfere with the uses and purposes reserved to the people of the state. That department of the state government is also authorized to regulate and control the use of those structures, and upon a proper showing it may regulate, alter, or remove the same. The act provides in that regard:

"Said department shall also in a similar manner, have power to remove, require to be removed, repaired or altered and to regulate the type, character, design, size, and maintenance of structures mentioned herein and existing at the time this section goes into effect, and to make reasonable rules and regulations in reference thereto."

[1] It is an established rule of law that extraordinary remedies by means of mandamus or injunction will not lie when adequate relief is afforded by statutory provisions which have not been pursued. San Joaquin & Kings River Canal & Irr. Co. v. County of Stanislaus, 155 Cal. 21, 27, 99 P. 365; Teeter v. City of Los Angeles, 209 Cal. 685, 290 P. 11; Greeson v. Imperial Irr. Dist. (D.C.) 55 F.(2d) 321, 324; 14 Cal.Jur. 230, § 41; 38 C.J. 568, § 39; High's Ext. Legal Rem. (3d Ed.) p. 22, § 16. In the authority last cited it is said in that regard:

"Whenever, therefore, an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, mandamus will not lie."

[2-4] Subject to the paramount authority of the federal government to control navigation in so far as it affects foreign and interstate commerce, the state of California owns the tidewater land adjacent to its seacoast below ordinary high-water mark. Subject to the right of free navigation, the state has the right to regulate and control the use of such tidelands for the general welfare of the public. 26 Cal.Jur. 307, §§ 524–532. This control of submerged lands over which the tides ebb and flow, with respect to the construction, maintenance, or removal of groins, jetties, sea walls, breakwaters, and bulkheads thereon has been conferred by the statute above cited upon the division of state lands of the department of finance of the state of California. This statute appears to supply an adequate remedy for the grievance of petitioners by means of an application to that department of the state government for removal of the structure complained of. Failure to pursue this statutory remedy by the petitioners is sufficient ground to authorize the court to deny the writ.

The petitioners seek to excuse their failure to apply to the division of state lands for a remedy by asserting that the statute referred to is unconstitutional and void for

the asserted reasons that it authorizes the taking of private property without compensation therefor in violation of article 1, section 14, of the Constitution; that the subject of the act is not expressed in its title as required by article 4, section 24, of the Constitution; that the act constitutes class legislation and confers an unlawful delegation of legislative power on administrative officers.

[5-7] We are satisfied that section 690.10 of the Political Code is not unconstitutional for any of the reasons assigned by the petitioners. It does not contemplate the taking of private property without just compensation. Indeed the act does not contemplate the taking of private property at all. It merely authorizes the construction, regulation, control, and removal of groins and other similar structures on overflowed swamp and tidelands which belong to the state. As we have heretofore said, the state owns all tidewater land below ordinary high-water mark. The very title to the act (Stats. 1931, p. 925) authorizes only "the construction, alteration and maintenance of certain structures upon the swamp, overflowed, marsh, tide or submerged lands of this state." If the maintenance of such structures do result in the diverting or destroying of beach land belonging to private individuals, then the very act provides for the alteration or removal of the detrimental structure by application to the division of state lands, which remedy the petitioners in this case failed to invoke. Moreover, this statute may be readily reconciled with the provisions of article 1, section 14, of the Constitution, so as to require the payment of just compensation under proper circumstances when the authorized structure results in the taking of private property by the destroying of littoral rights to property which borders on tideland. The petition in this case does not seek compensation for damages from the respondent. It is evident the Legislature did not intend to authorize the taking of private property without just compensation by the enactment of section 690.10 of the Political Code. The question as to whether the maintenance of groins on tidelands belonging to the state does result in taking or damaging private property depends entirely on the facts of each particular case. When a statute is adapted to a lawful purpose and appears to be valid and constitutional and, on the contrary, unless it appears on its face to controvert the provisions of the Constitution as a pure proposition of law "unmixed with matters of fact which must be determined on a trial," the court is bound to assume that the statute is constitutional. Stevenson v. Colgan, 91 Cal. 649, 652, 27 P. 1089, 14 L.R.A. 459, 25 Am. St.Rep. 230; Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028. Moreover, it has been held that one who fails to apply for a statutory remedy specifically provided for an act which is authorized by law, thereby waives the right to subsequently challenge the statute as unconstitutional. Hershey v. Reclamation District No. 108, 200 Cal. 550, 564, 254 P. 542, 547; O'Dea v. Mitchell, 144 Cal. 374, at page 378, 77 P. 1020. In the Hershey Case, above cited, it is said in that regard:

"The right to question the constitutionality of a statute may be waived. 'It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.' 12 C.J. 785. 'And where parties have failed to invoke a remedy provided by statute they are in no position thereafter to assert rights which could have been secured by that remedy, by endeavoring to invoke the aid of the Constitution.' 5 Cal. Jur. 627."

[8-13] The subject of the challenged act is adequately expressed in the title thereto, as follows:

"An act to add a new section to the Political Code to be numbered 690.10 authorizing the construction, alteration and maintenance of certain structures upon the swamp, overflowed, marsh, tide or submerged lands of this state, defining the powers and duties of the department of finance and of certain municipalities, districts, or other political subdivisions, in connection therewith; and prohibiting the construction or maintenance of fences or structures other than as herein authorized upon any accretions occasioned by such structures as are authorized hereunder." St. 1931, p. 925.

It is asserted the title to this section of the Code fails to refer to the "littoral owners" of property adjacent to tide or overflow land of the state who are the only individuals authorized by the act to petition for the construction, alteration, or maintenance of groins or jetties thereon, and that the title therefore fails to conform to article 4, section 24, of the Constitution in that regard, and that it is class legislation for the reason that it applies only to littoral owners of land to the exclusion of all other

individuals. We are of the opinion there is no merit in these contentions.

It is the well-established rule with respect to the constitutional provision which requires the subject-matter of an act of the Legislature to be expressed in its title that a liberal construction should prevail so as to uphold the object sought to be attained thereby if it is reasonably possible to do so, and that all that the Constitution requires in that regard is a reasonably intelligent reference in the title to the general subject-matter of the act. 23 Cal.Jur. 644, §§ 40–44; Hecke v. Riley, 209 Cal. 767, 775, 290 P. 451. The title to the challenged act in the present proceeding sufficiently fulfills the requirement of the Constitution in that regard.

The act is not invalid as class legislation for the alleged reason that it discriminates between littoral and nonlittoral owners of property adjacent to tide or overflow land. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; 5 Cal.Jur. 823, §§ 188, 189. It is obvious that the challenged section of the Code applies to all individuals as a class who own property marginal to the body of swamp, overflowed, marsh, tide, or submerged land upon which a groin, jetty, sea wall, breakwater, or bulkhead is sought to be constructed. There appears to be good cause for distinguishing between littoral and nonlittoral owners of land for the reason that those who own property bordering on such a body of water are naturally most vitally interested in preserving or protecting their marginal rights by such structures. Their littoral rights entitle them to unobstructed access to the water. It is not necessary that an act shall apply to all individuals uniformly. It is sufficient if it applies to all persons of a particular class, there being reasonable cause for applying that legislation to the selected class as distinguished from others who are differently affected by other circumstances.

[14, 15] Nor is this section of the Code unconstitutional and void for the alleged reason that it seeks to delegate legislative authority to an administrative board. It is a well-established rule of law that authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion in determining the terms, conditions, or facts upon which the board may permit the construction, maintenance, or control of structures authorized by the legislative act. 6 R.C.L. p. 179, § 179; 5 Cal. Jur. p. 683, § 97; 1 Cooley's Const. Lim. p. 228; People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630; In re Halck, 215 Cal. 500, 11 P.(2d) 389; In re Weisberg, 215 Cal. 624, 12 P.(2d) 446, 450; Ex parte McManus, 151 Cal. 331, 90 P. 702. In 1 Cooley's Const. Lim. (8th Ed.) p. 231, it is said in that regard:

"Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws."

In the case of In re Weisberg, supra, in upholding a statute authorizing the state fire marshal to license certain establishments for sponging and pressing garments, the Supreme Court said with respect to these delegated powers:

"We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by Carter v. Stevens, supra, 211 Cal. 281, 289–293, 295 P. 28, and Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, 'it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: "Indeed, it is not too much to say that a denial to Congress of the right, under the Con-

stitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." Union Bridge Co. v. United States, 204 U. S. 364, 367, 27 S.Ct. 367, 51 L.Ed. 523.'"

For the reason that the plaintiffs had an adequate statutory remedy for the removal of the groins complained of, the demurrer was properly sustained. The judgment is, therefore, affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.



11 Cal.App.2d 311

STARR v. SLANEY et al.

Civ. 10177.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Rehearing Denied Feb. 10, 1936.

1. Mines and minerals ⊂⇒74

Where executrix executed oil and gas lease upon realty belonging to estate of executrix' alleged agent as lessee, who optioned lease to another who assigned option, and notice of assignment was given to executrix and lessee, complaint, in assignee's action against executrix and lessee, alleging payment for option to purchase lease, tender of purchase price within option period, defendants' refusal to assign lease, assignment thereof to third party, and that assignee had been damaged thereby, *held* good as against general demurrers.

2. Pleading ⊂⇒192(6)

Where executrix executed oil and gas lease to executrix' alleged agent as lessee, who optioned lease to another who assigned option, notice of assignment being given to executrix and lessee, complaint, in assignee's action against executrix and lessee, for refusal to assign lease, *held* not demurrable on ground of misjoinder of parties defendant, where complaint did not show that assignee and his assignor understood that they were dealing exclusively with lessee.

3. Pleading ⊂⇒225(1)

If complaint was defective, demurrer should not have been sustained without leave to amend unless it appeared that complaint could not be amended to state cause of action.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by E. G. Starr against William J. Slaney and another. From a judgment for defendants after orders striking out plaintiff's amended complaint and sustaining demurrers thereto without leave to amend, plaintiff appeals.

Reversed.

Hill, Morgan & Bledsoe and Frankley & Spray, all of Los Angeles (Monroe B. Kulberg, of Los Angeles, of counsel), for appellant.

D. Joseph Coyne, of Los Angeles, and Leslie K. Floyd, of Modesto, for respondents.

SHINN, Justice pro tem.

Appeal from a judgment entered in favor of defendants after orders striking out plaintiff's amended complaint and sustaining demurrers thereto.

By his amended complaint, which we will call the complaint, plaintiff alleged facts which may be summarized as follows: Defendant Lucille Barry, as executrix of the estate of Adelaida Bermudes de Barry, deceased, pursuant to an order of court authorizing the same, executed to one William J. Slaney, as lessee, a certain oil and gas lease upon real property belonging to the estate. This lease, it is alleged, was taken by Slaney as agent of defendant as executrix. Thereafter Slaney, in consideration of $1,500 paid to him, optioned the lease to one Lewis F. Marquis for a price of $23,500; Marquis assigned the option to plaintiff for a consideration of $2,500, notice of said assignment being given to the defendants; plaintiff thereafter paid to said Slaney the sum of $1,000 for an extension of the option. Certain heirs objected to the lease and instituted proceedings to set aside the order authorizing the same, which proceedings were subsequently dismissed. Plaintiff within the option period tendered the purchase price of the lease of $23,500, which defendants refused; defendant Slaney, with the knowledge and consent of defendant Barry, sold and assigned the lease to a third party, which sale and assignment were confirmed and ratified by defendant Barry. It was also alleged that, at the request of

defendant Barry and upon her assurance that the lease would be assigned to him if he would do so, plaintiff employed counsel to assist in opposing the proceedings by which it was sought to set aside the lease, and in so doing incurred the expense of $1,000.

The complaint alleged and sought recovery of large damages, as the alleged value of the oil lease in question. Each of the defendants Barry and Slaney demurred to the complaint upon general grounds and upon the further ground that there was a misjoinder of parties defendant, in that each said defendant was improperly joined with the other. Motions were made to strike out various portions of the complaint upon the grounds that they were irrelevant, redundant, immaterial, sham, and constituted evidentiary matter, and upon the same grounds the defendants moved to strike out the entire complaint. These motions were granted in their entirety and the demurrers were sustained without leave to amend. Plaintiff appeals from the judgment which was entered in favor of defendants.

The brief of respondent is devoted entirely to a discussion of matters which it would seem were contained in the original complaint, which is not before us, and which matters do not appear in the amended complaint. Respondent advances no reason why the court should have sustained the demurrers or either of them, nor why the motions to strike out the amended complaint or the various and sundry portions thereof to which the motion was addressed, should have been granted.

[1-3] In any view that may be taken of the case, the complaint alleged the payment by plaintiff and his assignor of the sum of $2,500 for an option to purchase an oil lease, the tender of the purchase price within the option period, the refusal of the defendants to assign the lease, the assignment thereof to a third party, and that plaintiff had been damaged thereby, as we have stated. The complaint was good as against the general demurrers. The special demurrers present the point that defendant Barry, as principal, and defendant Slaney, as her agent, were improperly joined as defendants. This point likewise is not mentioned in respondent's brief. It is our opinion that the demurrers upon this ground were improperly sustained. Unless plaintiff and his assignor understood that they were dealing exclusively with defendant Slaney and relied exclusively upon his promises and agreements, and not upon those of his principal, the latter was liable for any recoverable damage sustained by plaintiff, and the agent, having made himself a party to the contract, was liable also. Marshall v. Bernheim, 64 Cal.App. 283, 221 P. 401; Feeney v. Clapp, 126 Cal.App. 729, 15 P.(2d) 178. While the amended complaint might have been, and probably was, uncertain in failing to allege these facts with particularity, it was not demurred to upon that ground. Both the defendants demurred upon the ground of misjoinder of parties defendant, but we think the demurrers on this ground were not sufficient to raise the question. The complaint does not show that plaintiff and his assignor understood that they were dealing exclusively with defendant Slaney. In this respect it was subject at most to the criticism of uncertainty, but it did not affirmatively show a misjoinder of parties defendant. Had the complaint been defective, the demurrer should not have been sustained without leave to amend, unless it appeared that the complaint could not be amended so as to state a cause of action. Tann v. Western Pacific Railway Co., 39 Cal.App. 377, 178 P. 971; Payne v. Baehr, 153 Cal. 441, 95 P. 895; 21 Cal.Jur. 120-1. Plaintiff's failure to ask leave to amend was excused by the order of the court striking out the entire complaint. It is quite obvious that the court was of the opinion that the action could not be maintained and that leave to amend would not have been granted had it been applied for.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

11 Cal.App.2d 210

In re GINSBERG'S ESTATE.

BLUM v. BLUM et al.

Civ. 5549.

District Court of Appeal, Third District, California.

Jan. 14, 1936.

Hearing Denied by Supreme Court March 12, 1936.

1. Joint tenancy ⇐3

Evidence sustained finding that decedent lacked sufficient mental capacity to create joint tenancy for himself and his sister.

2. Contracts ⇐92

Parties must be competent to enter into contract, and there must be mutual understanding of what is being done.

3. Banks and banking ⇐154(6)

Statute providing that, in absence of fraud or undue influence, deposit made in form of joint tenancy should be conclusive evidence of intention of depositors to vest title in survivor, *held* inapplicable where maker of joint tenancy account was mentally incompetent to enter into such an agreement (St.1929, p. 444, § 15a).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding in the matter of the estate of Harris Ginsberg, sometimes known as H. Ginsberg, deceased, wherein the final account of Ida Blum, executrix, was objected to by Samuel Ginsberg, also known as Sam Ginsberg. From an order settling the final account of the executrix, Ida Blum, individually and as executrix, appeals.

Affirmed.

Martin Gang, of Los Angeles, and Bradford, Cross & Prior, of Sacramento, for appellant.

Claude M. Adams and Fontaine Johnson, both of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from an order settling the final account of Ida Blum as executrix of the last will and testament of Harris Ginsberg, deceased.

The order, of which the executrix, appellant herein, complains, directs her to amend her account as filed and include therein the principal and accrued interest received from an alleged joint tenancy account opened by deceased in his lifetime in which he and appellant were beneficiaries.

Appellant contends the evidence was insufficient to justify the finding that the deceased was of unsound mind at the time he signed the purported joint tenancy cards which the order of the court annulled, and furthermore that an agreement creating a joint tenancy in a bank account is not subject to attack after the death of one of the parties on any ground other than fraud or undue influence. The real issue is whether or not the deceased possessed sufficient mental capacity to understand the nature of a joint tenancy agreement and its effect upon his estate.

The testimony in the case paints a picture of Harris Ginsberg, the decedent and the author of the attempted joint tenancy, as a man approximately 78 years of age, a native of Poland who had lived in Sacramento for many years and who, by thrift and industry, almost to the degree of miserliness, had accumulated considerable estate, sick, hard of hearing, illiterate, suspicious, taciturn, distrustful of every one with whom he came in contact, with the exception perhaps of his sister Ida Blum and a predeceased brother Max.

The court found that at the time of his death and for several years prior thereto the mental condition of decedent had become so impaired that in the latter months he was unable to look after his business affairs; that he resided with his sister, appellant Ida Blum, and a brother Max, and during the greater portion of that time decedent was in such a mental and physical state that it was necessary for Max to care for decedent in his business and physical requirements.

The court also found that on the 12th day of March, 1934, and after the death of Max, Harris Ginsberg was removed to the Eastmont Sanitarium, where he remained until his death on April 12, 1934. It was at this sanitarium on the 12th day of March, 1934, in the presence of an attorney, the sister Mrs. Blum, Mrs. Pellegrini, the manager of the sanitarium, a nurse and a representative from the bank that the joint tenancy signature cards were executed. It also appears in evidence that at the same time and place there was executed a purported last will and testament which gave all of the estate of decedent, share and share alike, to Ida Blum and Sam Ginsberg, the sole surviving sister and brother of the testator.

It also appears from the findings that Harris Ginsberg had been failing physically and mentally for a considerable period of time prior to his death and that he did not know or comprehend how much money had been paid him as liquidating dividends from the California National Bank, in which institution he had his funds, or how much he had to dispose of by his will. The court also found that he did not know he was signing a deposit card wherein appellant was becoming a joint owner with him in said account, nor did he know the nature of such account nor the effect of the joint tenancy agreement.

The court further found that no one, either before or after he signed said joint deposit card, explained to him what amount of money he possessed, and even if the nature of said transaction had been explained to him it would have availed him nothing for he was incompetent to understand such a situation, and at the time of the creation of said alleged joint tenancy account decedent was both mentally and physically incompetent to such an extent that he had no knowledge or understanding that he was creating a joint tenancy account and that he was incompetent to deal in such matters and unable at that time to understand the nature of such transactions and did not comprehend their effect upon his estate.

Such is a brief summarization of the findings of the court. Inasmuch as appellant contends that the evidence is insufficient to support such findings, it is the duty of the court to examine the record to ascertain what, if any, substantial evidence may be found in support thereof, considering not only the evidence adduced but the inferences which may be logically deduced therefrom. With that in mind we have examined the testimony of various persons with whom the decedent came in contact; the custodian of the safety deposit vaults, where for many years deceased kept his deposit box; officers of the bank wherein he had his bank account, an employee of a cigar store belonging to deceased, the trust officer of the bank, Mr. Miller, a long and close acquaintance of deceased, and others.

From the testimony of Mr. Cotter, the vice president and cashier of the National Bank of D. O. Mills, and later vice president of the California National Bank, we find he had known Harris Ginsberg for twenty or twenty-five years, during which time he had seen him perhaps once or twice a month; that in his opinion he was not mentally competent for the last few years prior to his death. This opinion was based upon observation of the decedent and conversations the witness had with him during the period of time mentioned. In 1921 Harris was given a cigar store by his brother Sam. The business was being operated at a loss and upon advice from the witness it was finally disposed of in 1928 and the proceeds turned over to the trust department of the bank, from which he withdrew sufficient money each month to maintain himself. From the way Harris attempted to operate this store and carry on his business affairs, the witness also formed an opinion that he was incompetent. The witness also testified that after the California National Bank closed he endeavored to explain to Harris Ginsberg the situation in regard to the bank, but was unable to make him understand. The witness also testified he was positive the decedent was mentally incompetent to understand what a joint tenancy account might be, which opinion was also based upon his observation and conversations with Harris Ginsberg over a period of years.

Mr. Didion, a teller in the bank wherein the decedent had his account, knew Harris Ginsberg for about thirty years and had seen him frequently, at one time over quite a period, almost daily, and later probably at least once every month and sometimes every two weeks or ten days. When asked his opinion as to the mental competency of the decedent, the witness said that after the bank closed he did not seem to be mentally competent, which opinion was based upon talking to the decedent and observing his general appearance. After the bank closed Harris would come to the bank about every two weeks and ask for his money and seemed unable to comprehend why he could not be paid. This conduct was repeated by Ginsberg again and again for a considerable period of time.

Mr. Smith, keeper of the vaults of the California National Bank, testified he knew the decedent for six or seven years, and that he did not think he was competent to transact business in 1933 and 1934, which opinion was based upon various eccentricities and acts of the decedent in regard to the handling of his safety deposit box and his general acts and conduct in connection therewith. He testified Ginsberg would come to the vaults and wander around listlessly, hand the custodian his key without saying anything, and it would be necessary

on almost every occasion to take him to the desk to sign an admittance card; that he was very absent-minded and would forget to replace the property in the box or he would leave the box open on the desk and he would have to be brought back in order that the box might be properly replaced and locked. The witness also noted a gradual decline in the physical and mental condition of the decedent and in the latter months he was less alert and more apt to wander aimlessly around the corridors of the bank.

Mr. T. V. Dunn, an officer in the same bank, testified that he knew Harris Ginsberg for about twenty-five or thirty years; that in his earlier years he was competent to transact business, but he observed a deterioration in the later years, and often if addressed he would not answer and would look at the questioner in a blank manner; that it was necessary for the witness to draw the monthly check in favor of Harris Ginsberg and to go with him to the teller to obtain the money therefor. Also he did not seem to understand the procedure and he depended entirely upon the trust department to handle the funds for him, and in his opinion the decedent would not understand the nature of a joint tenancy account.

Mr. Adams, a trust officer of the bank, knew Harris Ginsberg for about ten years prior to his death, and would see him on some occasions as often as once each week, and later once a month when he would call at the trust department to draw his monthly allowance. This witness was of the opinion that the decedent was not competent in his later years and based this statement upon his conversations, his general attitude, and his apparent lack of understanding of things that were told him. The witness attempted on many occasions to explain to Harris Ginsberg why he could not draw his money and how the affairs of the bank would be handled after its liquidation, but none of these things was the decedent apparently able to understand. He had at one time, in his younger days, been employed by the Southern Pacific Company, and was under the impression that the company still owed him considerable money, and at the request of the decedent the witness wrote to the company in regard to this matter, the company replying that it did not owe him any money and did not know upon what he was basing his claim, but Harris Ginsberg insisted on many occasions that he write again as he wanted his money from the company. Apparently this claim was groundless and but a figment of the imagination.

Other witnesses testified along similar lines to the foregoing.

It is also in evidence that he was dependent largely upon a predeceased brother, Max Ginsberg, during his lifetime, for assistance, and that he depended also upon his sister with whom he lived with his brother Max, prior to the death of Max.

Mrs. Pellegrini, the owner and manager of the sanitarium where Harris was taken, testified that she was present when the joint tenancy account card was signed, but she heard no one explain to Harris what the meaning or effect of a joint account was.

[1] Nothing would be gained by dealing with greater particularity in the various shortcomings and eccentricities of the decedent, but an examination of the record reveals sufficient to justify the finding of the court that the decedent was not possessed of sufficient mental capacity to understand the nature of a joint tenancy agreement or its effect upon his estate.

Some point is made of the fact that at the time of the execution of the joint tenancy agreement a will was executed at the same time and place, and that no attack was made upon this document. A very satisfactory explanation is made, however, that this will distributed the property in the manner provided by law and nothing would have been gained by an attack upon the will as the result would have been the same whether the property was distributed under its provisions or by operation of the law of descent and distribution.

It is next urged by appellant that inasmuch as there was no evidence or finding on the issue of fraud or undue influence that the rule as to the evidentiary effect of a joint tenancy agreement as set out in section 15a of the Bank Act, St.1909, p. 87, as added by St. of 1921, p. 1367, amended by St.1929, p. 444, would apply. Such act provides that "the making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor."

[2] It is essential that in any contract, whether to create a joint tenancy account or otherwise, there must exist parties competent to enter into the contract and there

must be a mutual understanding of what is being done. The Bank Act did not intend to create a contract if in fact none existed.

Respondent cited and relied upon the case of O'Brien v. United Bank & Trust Co., 100 Cal.App. 325, 279 P. 1048, 1050, wherein the court said: "She cites and relies on section 15a of the Bank Act (St.1921, p. 1367). There is nothing in the statute showing that the Legislature was addressing itself to agreements attempted to be executed by insane or incompetent persons. Repeals by implication are not favored, and, nothing to the contrary appearing, sections 38, 39, and 40 of the Civil Code will be construed together with section 15a of the Bank Act, and force and effect will be given to the provisions of each."

[3] We are therefore of the opinion, by the reading of the testimony and on examination of the authorities cited, that the decedent was of unsound mind at the time he signed the so-called joint tenancy cards, and that the section of the Bank Act referred to has no application where the creator of the joint tenancy account was mentally incompetent to enter into such an agreement.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



11 Cal.App.2d 180

CARRIER v. PIGGLY WIGGLY OF SAN FRANCISCO.

Civ. 9649.

District Court of Appeal, First District, Division 1, California.

Jan. 10, 1936.

Hearing Denied by Supreme Court March 9, 1936.

1. Appeal and error ⇐1011(1)

Finding on conflicting evidence that person had authority to bind corporation would not be disturbed on appeal, where there was ample evidence to support finding.

2. Frauds, statute of ⇐116(3, 4)

Authority of agent of corporation need not be in writing so far as statute of frauds is concerned.

3. Appeal and error ⇐882(5)

Defendant could not urge insufficiency of complaint for breach of contract to accept laundry service and garments, where defendant's counsel stated to court that chief issue was whether contract existed and that defendant advanced special defense that whoever signed contract had no authority to bind defendant.

4. Damages ⇐124(1)

Under contract whereby plaintiff agreed to supply linen for defendant's employees for one year and for like period thereafter unless terminated by notice and, if contract should be terminated by defendant, defendant agreed to purchase entire stock purchased by plaintiff for such service at price of plaintiff's cost, plaintiff *held* entitled to judgment for its cost of linen in good order after defendant's termination of contract plus what plaintiff would have earned had defendant continued to take service.

5. Damages ⇐190

In action for breach of contract to accept laundry service and garments worn by defendant's employees, under which contract plaintiff was entitled to certain minimum per week, defendant could not escape liability on ground that there was no proof to show what plaintiff's net profit might have been after termination of contract by defendant, where contract price was prima facie what plaintiff was entitled to less cost of earning weekly minimum.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Craig Carrier against Piggly Wiggly of San Francisco, a corporation. From a judgment for plaintiff, defendant appeals.

Modified, and, as modified, affirmed.

Sherman & Peters, of San Francisco, for appellant.

Hettman & Scampini and Herbert Chamberlin, all of San Francisco, for respondent.

McNUTT, Justice pro tem.

Plaintiff transacted a linen supply business, furnishing to Piggly Wiggly stores, among others, laundry service and garments worn by employees. In 1925 the business relation of the parties commenced, and it continued up to about June of 1927, when the defendant discontinued it. An employee of plaintiff called at the office of defendant to ascertain why plaintiff was no longer receiving patronage, with the final

result that defendant and plaintiff entered into a contract which is the basis of this suit.

"San Francisco, December 31, 1927.

"Pacific Linen Supply Company (supplier) agrees to provide and deliver as requested, and Piggly Wiggly of San Francisco (hirer) agrees to take, all clean linen required or used in hirer's business at all stores in San Francisco (General Offices 446 Bryant Street, San Francisco) for the period of Twelve Months from December 31, 1927, and for like periods thereafter unless terminated by thirty days' notice thereof before the expiration of any period.

"Hirer shall pay for said linen at the following rates:

Article	Minimum Weekly	Price	
* * *	* * *	* * *	each
Caps-Blue	100	.12	"
* * *	* * *	* * *	
* * *	* * *	* * *	
Gowns-Blue	100	.35	"

"The foregoing prices are based upon the agreement of hirer to take and use supplier's linen exclusively for the term hereof.

"Hirer shall return all linen supplied hereunder in good order and condition, reasonable wear and tear excepted, or pay for same at the following rates: * * *

"At the expiration of this agreement the hirer agrees to purchase from the supplier the entire stock purchased by supplier for this service at the price of supplier's cost. This purchase, however, is contingent upon this agreement being terminated by the hirer.

"Title to all linen shall remain in supplier.

"Piggly Wiggly of San Francisco,
"By Y. B. Rediker.

"Pacific Linen Supply Company,
"By Peyton Barnett.

"Received from the above named hirer the sum of ——— dollars as guarantee for the faithful performance of the above contract.

"Pacific Linen Supply Company,
"By ————."

[1, 2] Judgment went for plaintiff, and defendant appealed.

The evidence was in conflict as to the authority of one Rediker to bind the defendant corporation. Since there was evidence ample to support the finding in favor of such authority, it cannot be disturbed on appeal. Appellant contends that, since the contract was one, of necessity, in writing, the authority of the corporate agent to enter into the same must have been in writing. The trend of authority is to the contrary. Corporations can act only through the agency of natural persons, and it has been held that the authority of an agent of a corporation need not be in writing, so far as the statute of frauds is concerned. McCartney v. Clover Valley Land & Stock Company (C.C.A.) 232 F. 697, citing Boggs v. Lakeport Agricultural Association, 111 Cal. 354, 43 P. 1106.

[3] Appellant urges the insufficiency of plaintiff's complaint. Its opening brief devotes some time to arguing its demurrer and motion to strike. From the record as a whole it is clear that this case was fully and fairly tried upon the complaint which was sufficient to present and did present issues and that the appellant was not in any sense misled. The reporter's transcript contains the opening statements made by counsel for the respective parties, from which it appears that the only vital issue, apart from interpretation of the contract, was the authority of the corporate agent to enter into the contract. We quote from page 6 thereof where counsel for defendant below, here appellant, addressed the court as follows: "Of course, the chief issue is whether the contract is in existence. We denied it. We simply advance as our special defense that whoever signed the contract had no authority at all to bind the corporation." Under the authority of McKay v. Hedger, 139 Cal. App. 266, 34 P.(2d) 221, 224, we believe that appellant cannot be heard to complain. It is there said: "In concluding that the informality of the complaint did not mislead appellants, and therefore is not prejudicially erroneous, we can adopt the following language from Tietke v. Forrest, 64 Cal.App. 364, 221 P. 681, 682: 'The matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to his injury. Stein v. United Railroads of San Francisco, 159 Cal. 368, 113 P. 663.'"

[4] Appellant, Piggly Wiggly, received service from respondent up to March, 1930, when it declined to receive further service and repudiated and hence terminated the contract. From the point of discontinuance up to the end of the year 1930, which was during the life of the contract according to

its terms, respondent was entitled to the established weekly minimum of $47 for 43 weeks, less the overhead cost of $21.65 per week. The court below, however, gave respondent judgment for $2,021, which was the full contract cost of service. Inasmuch as this service was not rendered, the plaintiff is entitled to judgment for its costs of caps and gowns in good order up to the termination of the contract, namely, March, 1930, plus what it would have earned had Piggly Wiggly continued to take the service according to its agreement. Therefore $930.95 is to be deducted from the recovery which plaintiff had below because it amounted to unexpended overhead.

We have thus answered the question put by appellant: Are damages properly allowed where there is no allegation of damages or facts whereby such damage may be measured; because by giving to the plaintiff his contract price of service, less the overhead cost of rendition, he is getting only what his contract called for.

Upon the initial discontinuance of service by plaintiff, Piggly Wiggly had laid in a stock of caps and gowns in colors, and up to the time of the signing of the contract was having those gowns laundered by some one other than the plaintiff. The evidence shows that the contract was entered into because its previous method of caring for its need had proved unsatisfactory. The considerations which appear to have induced this contract were that the plaintiff buy the stock of blue garments which Piggly Wiggly had on hand, at their cost, and that plaintiff, having laid in a sufficient supply to take care of defendant's needs, defendant agreed to take off the hands of plaintiff, in the event of termination of the contract by the hirer, gowns then on hand at their cost to the plaintiff supplier. The evidence further shows that plaintiff could not afford to lay in this stock of gowns and give the service at the prices set out in the contract unless Piggly Wiggly agreed to certain weekly minimums. The contract was not terminated by the thirty days' notice before the expiration of any annual period; therefore plaintiff brought suit for recovery of the sums agreed to be paid under the contract during its life, namely, for service from March to the expiration of the year 1930, and for the cost to plaintiff of the gowns on hand at date of discontinuance or termination.

The court below rendered judgment for plaintiff for the full amount prayed upon the theory that the payments required by the contract furnished a prima facie measure of damages and that the burden of proof was on the defendant to show, if it could, that such were not the actual damages. Marconi W. T. Co. v. North P. S. S. Co., 36 Cal.App. 653, 173 P. 103. However, the evidence was uncontradicted that it cost the plaintiff $21.65 overhead to render the service per week; therefore, since no service was rendered between March and December, the hirer was entitled to the benefit of this allowance as unearned by the plaintiff because unexpended by the supplier.

[5] Appellant suggests that no finding was made that defendant agreed to make minimum payments, the answer to which is that the contract is pleaded, and, when its terms are read, together with the conduct of the parties under it, it follows that the judgment of the lower court in that behalf was proper. And again it is urged "there was no proof offered at the trial to show what plaintiff's net profit might have been after March 1st, 1930." In this we cannot agree. The contract price was prima facie what the plaintiff was entitled to less the cost of earning the weekly minimum for which, by this decision, appellant is given credit by a reduction pro tanto in the judgment.

No notice is taken of the claim by appellant that Piggly Wiggly of San Francisco, a corporation, was dissolved or of the effect of said dissolution because of the express stipulation below that those were matters not before the court.

Appellant contends that the judgment is excessive in that, though no service was rendered between March, 1930, and December, 1930, the supplier was given its cost of gowns as of March, 1930, rather than at the end of a year when an allowance should be made for deterioration. It would be impracticable to ascertain what this element would amount to, and such impracticability evidently impelled the parties to draw the contract in the terms in which they did, allowing as liquidated damages the cost to plaintiff of the value of his supplies on termination.

The judgment is therefore modified by reducing the amount of recovery in the said sum of $930.95, and, as so modified, stands affirmed; each party to bear his own costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

11 Cal.App.2d 244

PEOPLE v. SINGH et al.

Cr. 1461.

District Court of Appeal, Third District, California.

Jan. 15, 1936.

Hearing Denied by Supreme Court Feb. 13, 1936.

1. Criminal law ⇐572

Jurors may disbelieve witnesses for cause, and proof of alibi may fail when it conflicts with other reliable testimony or when it is inherently unbelievable.

2. Homicide ⇐268

In prosecution for assault with deadly weapon with intent to commit murder, evidence *held* insufficient for jury, in view of conclusive proof of alibi.

3. Homicide ⇐166(1)

In prosecution for assault with deadly weapon with intent to commit murder, on theory that accused wanted to kill victim because victim allegedly had refused to serve as spy against another who allegedly furnished information to immigration officers which caused accused trouble, disallowing accused to state whether he had any trouble with such other *held* error.

4. Witnesses ⇐274(1)

In prosecution for assault with deadly weapon with intent to commit murder, wherein accused and victim were Hindus, cross-examination of accused's character witness whether on certain date he was running store with another who got killed by another Hindu *held* improper.

5. Criminal law ⇐723(5)

In prosecution for assault with deadly weapon with intent to commit murder wherein accused and victim were Hindus, arguing in effect that it is characteristic of Hindu race to murder their people in mysterious manner, to mutilate their bodies, and to come into court and lie and to do all they can to defeat justice, *held* prejudicial.

6. Homicide ⇐100

In prosecution for assault with deadly weapon with intent to commit murder, on theory that defendant personally fired shot and that codefendant was guilty as accessory, codefendant could not be convicted as accessory where evidence conclusively showed that defendant was not present and did not fire shot.

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Sansar Singh and another were convicted of assault with deadly weapon with intent to commit murder, and they appeal.

Reversed.

Ray Manwell, of Marysville, and J. Oscar Goldstein, of Chico, for appellants.

U. S. Webb, Atty. Gen., and Neal Chalmers, Deputy Atty. Gen., for the People.

THOMPSON, Justice, delivered the opinion of the court.

The defendants have appealed from separate judgments of conviction of the crime of assault with a deadly weapon with intent to commit murder. They were jointly charged in two counts of an information, first, with a conspiracy to commit murder, and, second, with an assault with a deadly weapon with intent to kill Beer Singh, a human being. They were jointly tried. At the trial, on motion of the district attorney, the first count was dismissed. Both defendants were convicted on the second count.

Rose Singh is 23 years of age. She is the wife of Naurang Singh. She was formerly married and divorced. She is the mother of a minor child by her first husband. For about three years she had been acquainted and was very friendly with the prosecuting witness, Beer Singh, who is an unmarried man employed on the Anderson ranch near Marysville. She often visited with him in his room on that ranch. She was also very friendly toward Sansar Singh who used to be a ranch foreman in the fields at Wheatland, but who for three years had owned and operated a shop in Marysville where he sold tobacco and liquor. For some time Rose had been employed by Sansar in his place of business waiting on his customers and taking care of the store and house, for which service she received $30 a month. Both Rose and Sansar had separate rooms in the same building, where they slept. Sometimes she prepared meals for both of them. She visited her husband, Naurang Singh, quite regularly, in the separate home which he maintained. He was a laboring man who earned three or four dollars a day. All of these people belong to the Hindu race. Sansar and Beer had been acquainted for several years. They were not particularly friendly, although no serious trouble existed between them. Beer, however, infers that Sansar tried to get him to "watch Amar

Singh" who was a competitor of Sansar's in the liquor business in Marysville, with the purpose that he might "kill somebody." The only reason which is suggested by Beer for this request is an inference that Sansar thought Amar had once reported to the officers information which involved him in trouble with the immigration commission, which was subsequently settled. Beer did not patronize Sansar's business, although they always spoke to each other cordially.

On the night of May 25, 1935, the Hindu people held a public celebration in Marysville. Many of them gathered from the surrounding country. The festivities included music, dancing, drinking, and feasting. The fete commenced about 9 o'clock in the evening. One of the principal places where the Hindus congregated was the El Dorado resort in that city.

Rose had been tending the counter that evening in Sansar's place of business. He had very few customers. Most of the Hindus gathered elsewhere for the festivities. About 9 o'clock Rose told Sansar she was not feeling well, and she then retired to her room where she did a little sewing and prepared her toilet by the use of a lipstick and cold cream for the evident purpose of going out. At 9:30 o'clock Sansar closed his shop with the intention of attending the celebration. He took his automobile, which was parked in front of the building, to a public garage, where it remained the balance of the night, and he then mingled with his countrymen on the streets, finally arriving at the El Dorado resort. Immediately after Sansar left his place of business, according to Rose's story, Beer tapped on her bedroom window and told her to come out that he might relate to her some important news. She at once put on her coat and met him on the street. He claims that she came to him of her own volition and without his invitation, and that she importuned him to take her riding in his car. It is evident that both of them were perfectly willing to make the journey together. They left town about 10 o'clock and drove along an unfrequented road a distance of seven or eight miles to a point near which a dredger was stationed. It was dark. The moon was not shining. It does not appear that Sansar knew they had gone riding or that he was aware of their destination. Beer parked his automobile by the side of the road and taking a blanket from the seat of his car they walked down a pathway some distance toward the dredger where he spread it on the ground near a clump of bushes which he found at the margin of an orchard. Both of them testified that they sat there for some time and that there was some demonstration of love between them. They deny that improper relations transpired between them. Rose said that Beer made lascivious and threatening advances toward her and that she fled for protection toward the car where Beer had left his sweater with a revolver in the pocket thereof, that he pursued her, but that she reached the car first and seizing the revolver she fired one shot toward him in her own defense, not intending to hit him, and not knowing whether she did hit him. The bullet, however, struck him in the back beneath the shoulder blade and passed straight through his body, lodging between the ribs in his chest. He ran down the pathway and fell into a sand pit. Rose denied that another car arrived in that vicinity or that Sansar or any other person except Beer was present. Sansar also denied that he was there or that he knew anything about the affair. He declared that he did not leave town that night. Realizing that she might have hit Beer, because of his outcry, Rose ran after him, calling for him to come back. She failed to find him on account of the darkness, and, arriving at the place where the dredger was stationed, she threw the revolver into the water which surrounded the machine. The revolver was not recovered. Rose then went to the home of the Lolmaughs, which was located a couple of hundred yards distant, and told them a fanciful story about being attacked by a friend who had brought her out there in his machine, and of her flight to protect herself. She arrived at the Lolmaugh house at 11:30 o'clock and persuaded them to take her to Marysville in their automobile.

Beer told a very different story. He claimed that Rose importuned him to take her out in his car along a lonely road with which he was not familiar; that at her request he parked his car and walked with her down the pathway to look at the dredger; that they quarreled about a dress which Rose wanted him to purchase for her at a cost of about $10, but which he refused to buy, saying that he had only $1.50. He denied that he took the blanket

from his car or that he placed it on the ground near a clump of bushes. He said that they stopped on a bridge and were talking in a friendly manner when he saw another car drive up and park near his own machine. He asked Rose, "Is that Sansar coming to cut us up?" to which she replied, "No, it is none of his business." He testified that he recognized Sansar running down the pathway toward them with a revolver which he fired at him five or six times in rapid succession, and that one bullet hit him in the back as he ran away; that he fell into a sandpit, where he lay for some time in great pain, during which period Rose and Sansar disappeared; that he crawled out of that pit and went to the Manley house near by, arousing them by striking on the house with a club which he had picked up; that he told them he had been shot, and, after listening to his story, they telephoned for the officers, who promptly came from town and took him to the hospital. Beer made statements to the officers immediately after the shooting occurred in which he asserted that Rose shot him. He also told the Manleys the same thing, except that he added his belief that Rose and Sansar had "framed him."

Aside from the statement made by Beer at the trial that he recognized Sansar as the one who shot him, there is no substantial evidence connecting Sansar with the shooting affair, except that, after the arrest of both Sansar and Rose, some twenty Hindus met in Marysville for the apparent purpose of settling the differences between Sansar and Beer. Sansar had been released on bail and attended that meeting. He was said to have called his countrymen together for that purpose. Two Hindus testified that Sansar or some friend in his behalf said that he would pay Beer $2,000 and his hospital expenses to settle the matter in so far as he was concerned. Several of them stated that Sansar always said he had nothing to do with the shooting, but was willing to make an amicable settlement between himself and Beer. This was refused by Beer. This circumstance, standing alone, may be explained on a theory of the innocence of Sansar, as well as otherwise. At the trial a very complete alibi was established in behalf of Sansar.

Upon the foregoing facts, both defendants were convicted of the charge of assault with a deadly weapon with intent to commit murder. Separate judgments were rendered against them. From these judgments both defendants have appealed.

The appellants contend that the verdicts and judgments are not supported by the evidence, that reversible errors occurred in the course of the trial, and that the prosecuting attorneys were guilty of prejudicial misconduct consisting of statements which they made in their arguments to the jury to the effect that the Hindu people were notorious murderers and perjurers.

A conclusive alibi was established in behalf of Sansar Singh which requires a reversal of the judgment with respect to him. Eight white witnesses testified to facts which are undisputed, except for the inherently improbable statement of the prosecuting witness, making it impossible for Sansar to have been present or to have participated in the shooting of Beer Singh.

The shooting occurred at 11 o'clock at night. That fact is established without conflict of evidence. The Lolmaugh residence is situated "almost within a stone's throw" of the place where the shooting occurred. Mr. and Mrs. Lolmaugh and their oldest son were playing cards in their home at that time. They had just finished a game when Mr. Lolmaugh looked at the clock and remarked that it was then five minutes to 11 and time to go to bed. As usual, they agreed to play "just one more game" before retiring. They had scarcely commenced the game when a single shot was clearly heard near by. Mr. Lolmaugh arose and turned on the porch light to investigate the cause of the shooting. He was able to see nothing and they heard no other shots, so he returned to resume the game. All of the members of the Lolmaugh family agreed that it was then within a couple of minutes of 11 o'clock and that not more than one shot was fired. There is no evidence to the contrary, and we must assume the shot was fired at that time.

The undisputed proof establishing the alibi of Sansar beyond doubt consists of the following evidence: He owned only a five-passenger black Chevrolet sedan which he drove into a public garage at 9:30 o'clock that evening when he closed his place of business. His automobile remained in that garage all night. No one testified that he saw Sansar drive out of the city or return to it that night. Eight white reliable witnesses saw him and talked with him at different times that night

between 10:30 and 11:15 o'clock, during which time the shooting occurred. Four of those persons saw him in the city between ten minutes of 11 and three minutes after 11 o'clock. James Purrington, a prominent farmer who had lived all of his life a few miles south of Marysville, and who was acquainted with Sansar, testified that in company with his wife and their neighbor he was searching for a friend in Marysville when they met Sansar on the south side of Third street at 10:45 or 10:50 o'clock, and stopped to talk with him for a few minutes. He said: "I talked to him (Sansar) because I was looking for James, and Sansar knew James. I stood there and talked a few minutes hoping that Jimmie would show up. * * * I looked at my watch * * * and it was ten minutes to eleven when I left that corner." Mrs. Lucille Purrington testified that they met Sansar at that point on Third street and that her husband talked with him so long that she "became impatient." She said that as they left him her husband took out his watch and remarked that it was then ten minutes of 11 o'clock. Mrs. Bertha Norcross, a neighbor of the Purringtons, corroborated that evidence, testifying that they met Sansar near the Garrett & Co.'s place of business on Third street, that Mr. Purrington introduced him to her and stood there five minutes or more talking with him; that they were looking for a friend who promised to meet them about that time, and that when they left Sansar, Mr. Purrington looked at his watch and remarked that it was then ten minutes of 11 and that they would not wait much longer for Jimmie. Mr. Gus Alex, a white man, a produce dealer and a professional wrestler, testified that he met Sansar, with whom he was well acquainted, in the El Dorado resort in Marysville, where many Hindus had congregated that night; that it was then about 10:30 o'clock, and he talked with him for fifteen minutes, and then left the resort. He testified that he again returned to the El Dorado resort at about 11 o'clock and found Sansar there at that time. He said he came back and found Sansar there "exactly at three minutes after eleven. * * * I * * * looked at the big clock * * * outside the door on the corner of the building." Mr. Booth, the night watchman of Marysville, corroborates the latter portion of the last-mentioned statement. He says that he was on duty that night and entered the El Dorado resort at 11 or 11:15 o'clock and saw Sansar standing there watching a blackjack game. Mr. Le Boeuf, a police officer of that city, testified that he met and talked with Sansar on Third street "about ten-thirty" o'clock the night of the shooting. Mr. McFarlane, a special police officer of Marysville, testified that he also met Sansar on Third street that night "about ten-thirty or ten thirty-five." And finally Frank Graves, an attorney at law of that city testified that he was personally acquainted with Sansar and that he met him in town twice that night, first at the corner of Third and D streets at 10:20 to 10:30 o'clock, and the last time Graves saw him was when he came out from a restaurant at 11:30 o'clock. Since it was not possible for Sansar to have procured a machine and to have driven fourteen miles out to the dredger and back, with the necessary delays of starting his engine, parking his car and running some distance down a pathway in pursuit of his purported victim while he emptied the chambers of his revolver, in thirteen minutes from the time the Purringtons left him on Third street until he was again seen in the El Dorado resort, even if he had known exactly where to find Rose and Beer, it is certain that Sansar was not at the place of the shooting when it occurred at 11 o'clock, and that he did not participate therein. There is no escape from this inevitable conclusion.

[1] It is true that jurors are privileged to disbelieve witnesses for cause and that proof of an alibi may fail when it conflicts with other reliable testimony or when it is inherently unbelievable, but, in the present case, it may not be said the convincing evidence of the several unimpeached white witnesses is overcome by the inherently improbable story of Beer Singh with all of its discrepancies. The evident disregard of the conclusive effect of the proof of a complete alibi in the present case in behalf of Sansar indicates that the verdict against him was the result of race prejudice, particularly in view of the prejudicial statements of counsel in that regard, which were approved by the court. At least the verdict against Sansar is contrary to the convincing facts of the case, and therefore should not be permitted to stand.

The alibi is also supported by other evidence and by the substantial impeachment

of Beer's testimony which necessarily follows the contradictory and unbelievable statements which he made regarding the essential circumstances of the affair. Both defendants testified that Sansar was not at the place of the shooting. Rose took the witness stand and admitted that she fired one shot at her companion, but asserted that she did so in defense of her person. At the trial Beer testified that he did not take his blanket from the machine or spread it on the ground beneath the clump of bushes. He says that he recognized both Sansar and his machine as he drove up and parked his automobile beside his own car. He asserts that Sansar came running down the pathway and that he fired five or six shots at him in quick succession. These statements are necessarily false. It was dark. The moon was not shining. It is improbable that Beer could have recognized either a person or a car at that distance under the circumstances. It is absolutely certain that Sansar's machine was not there. It is an undisputed fact that it remained in the public garage all that night. The members of the Lolmaugh family, who lived near by, and who distinctly heard the shot which Rose fired, declared that only one shot was fired. The following morning the sheriff and his officers found Beer's blanket spread out beside the clump of bushes, together with Rose's white gloves and a 50-cent coin. It is not unlikely Rose resented Beer's effort to compensate her with a four-bit piece instead of buying her the $10 dress which she coveted. After Beer climbed out from the sand pit into which he had fallen, he went to the Manley home nearby, where he arrived at 11:30 o'clock, and pounded on the house with a club to arouse the inmates thereof. They promptly came out and found him lying on his back suffering from a painful wound. They thought he was drunk, and asked him what had happened. He replied that he had been shot. When they asked him who shot him, he said that Rose shot him. On cross-examination of Mr. Manley, he said that Beer told him Rose and Sansar "framed him," and that, when Rose saw Sansar coming toward them from the machine, *she* shot him. Mr. Manley telephoned to the officers, who promptly drove out from Marysville and took Beer to the hospital. In the presence of the sheriff, the physician, nurse, and other persons, Beer, expecting to die, made a declaration concerning the affair which was taken down in writing and which was received in evidence without objection. This statement also asserts that Rose did the shooting. It reads: "My name Beer Singh; work for Andreasons. Yuba City. Rosie at store. Rosie asked me to take a ride. Asked me for ten dollars. No give it to her. We drove to the dredger. Asked me to get out and walk to the dredger. On the way she shot me, and I run away. Sansar drove up in car. When she saw the car she commenced shooting, and I started running. I recognized Sansar in car. Also know his car, and voice. My name Beer Singh. I made the statement knowing I am going to die. I am going to die, I guess I will know when I die."

It is true that two Hindu witnesses claimed to have seen Sansar in a *green* coupé car that night in Marysville at about 10:30 o'clock on C street. They did not see him drive out of town. Their statements may be reconciled with the other evidence concerning the alibi. He may have driven directly to the El Dorado resort where he was seen about that time by several persons. Probably he did not enter a green car. They may have seen him driving his own machine to the garage at 9:30 o'clock. Sansar did not own a green coupé. The green car is not accounted for. If Sansar had a Hindu friend who owned a green coupé in or near Marysville, it should have been easy to locate that car. These Hindu witnesses were Eshar Singh and Briam Singh. Eshar, who worked on the Andreason ranch with Beer Singh, said that he saw Sansar come from his place of business at about 10:30 o'clock that evening and enter a *green* coupé machine alone and drive down C street. Briam Singh merely said that he stood in front of Daman Singh's store on B street at about 10:30 or 10:40 o'clock that evening and recognized Sansar as he drove by in a coupé car.

[2] The evidence that Sansar could not possibly have been at the place of the shooting at 11 o'clock that evening is most convincing. His alibi is conclusively established without substantial conflict. It necessarily follows that there is no reliable evidence to support the theory of the prosecution that Sansar shot Beer Singh. It is therefore necessary to reverse the judgment with respect to Sansar Singh.

[3] The appellants contend that the court erred in sustaining respondent's objection to their question propounded to

Sansar for the purpose of explaining the trivial nature of the difficulty which existed between him and Amar Singh so as to rebut the inference of Beer that Sansar sought to kill him because he had refused to "watch Amar" at the request of Sansar so as to get a chance to kill Amar. An objection on the part of the prosecution was sustained to the following question asked of Sansar by the appellants, to-wit: "Q. Did you have any trouble [with Amar] at all?" Certainly this question called for competent evidence. The theory of the prosecution was that Sansar had induced Rose to entice Beer out to the vicinity of the dredger so that he could follow them and kill Beer because he had refused to serve him as a spy against Amar whom Sansar planned to kill because he was supposed to have furnished information to the immigration officers which caused Sansar trouble. It became very important to determine the cause and extent of the enmity, if any, which existed between Sansar and Amar. That was the very purpose of this question. The answer should have been received, and the defendants should have been permitted to develop that subject.

[4] The objection should have been sustained to the question which was propounded by the prosecution on cross-examination of defendants' character witness, as follows: "In 1925 you were running a store down here with Mr. Manrow, *who got killed by another Hindu*?" Clearly this was intended to prejudice the jurors against the Hindus as a race. It was incompetent and improper. The objection to that question should have been sustained.

[5] It was prejudicial misconduct for the prosecuting officer to argue to the jury in effect that it is characteristic of the Hindu race to murder their people in a mysterious manner, to mutilate their bodies, and to come into court and lie and to do all they can to defeat justice. It was error for the court to refuse to instruct the jury to disregard that language. That language has no legitimate application to the issues before the jury in this case. It is a clear appeal to race prejudice, which practice has been uniformly discountenanced by the courts. People v. Simon, 80 Cal.App. 675, 252 P. 758. The case of People v. Lee Yick, 189 Cal. 599, 209 P. 538, upon which the respondent relies in support of these statements is not in point under the circumstances of this case. The syllabus of that case correctly states the ground upon which that alleged prejudicial statement was held to be harmless. It is there said: "It was not misconduct for the district attorney in his presentation of the case to the jury to make reference to tong wars, since it is a matter of common knowledge that the Chinese resort to systematic murders of members of opposing tongs in order to carry out their purposes."

The comment which was approved in the Lee Yick Case has reference to a Chinese tong organization commonly known in California to have participated to an alarming extent in secretly killing Chinese individuals in what has been familiarly known as "tong wars." That was a reference to the common knowledge of the unlawful practices of Chinese tong organizations. It did not reflect upon the characteristics of a nation as a whole. In that case a mysterious murder was involved. It appeared that the defendant, as second president of a certain Chinese tong, had given orders to the members of his tong to kill the deceased. There was evidence implicating the defendant's Chinese tong in the murder of the deceased, and it was therefore proper to refer to the methods of the tong in carrying on its warfare. No such situation exists in the present case. No Hindu organization was involved in this case. No secret unlawful Hindu organization was mentioned. The challenged language of the prosecuting attorney in this case was specifically directed to alleged "characteristics of the *Hindu people.*" It is undoubtedly true that certain Hindu individuals resort to secret and ruthless murder, and that they do not hesitate to perjure themselves in our courts, but that does not justify the conviction of a Hindu without evidence that he belongs to that class, on the theory that such depraved conduct is characteristic of the entire race and that the accused should therefore be convicted on general principles. The same charge of secret inhuman murder and indiscriminate perjury may be attributed to such organizations as the former Capone gang of Chicago. Certainly that will not justify one in asserting that such gangster methods and outlaw conduct are characteristic of the American people as a nation. Our laws justify the conviction of an accused person only upon

competent evidence of his guilt of a specific offense. It does not warrant a conviction by an appeal to race prejudice or by reference to common knowledge of mere general race characteristics.

[6] Since the theory of the prosecution upon which both defendants were convicted was, and could be based only on the assumption, according to the testimony of Beer Singh, that Sansar personally fired the shot which injured him, and that Rose was also guilty only because she was present and aided and abetted him in the commission of that crime, it necessarily follows that, since we have held that the evidence conclusively shows without reliable contradiction that Sansar was not present and did not fire the shot, Rose was improperly convicted as an accessory. If she is guilty of an unlawful assault with a deadly weapon, she should be tried and convicted only as the principal who personally fired that shot. She freely admits that she fired the shot, but she claims that she did so in necessary self-defense. The jury should be given a fair opportunity of determining whether she did act in necessary self-defense. She is entitled to have this issue presented to a jury free from the confusing and erroneous theory that Sansar himself did the shooting. For that reason we are of the opinion the judgments should be reversed with respect to both appellants.

The judgments are reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

11 Cal.App.2d 284

BETTIS v. PATTERSON et al.

Civ. 5439.

District Court of Appeal, Third District, California.

Jan. 17, 1936.

1. Patents ⇐211(1)

If, in granting of license to use or vend patented invention, there is no express covenant that licensor will protect licensee from infringement, no such covenant can be implied to defeat licensor's right to recover stipulated royalties.

2. Patents ⇐211(1)

Under contract whereby patent licensor agreed to defend at his own cost suit attacking validity of patent and agreed to permit licensees to bring suit in licensor's name against those infringing, no duty rested upon licensor to stop infringements, and his failure to do so did not justify licensees' refusal to make reports and pay royalties.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by William I. Bettis against C. L. Patterson and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lyon & Lyon, Frederick S. Lyon, and R. E. Caughey, all of Los Angeles, for appellants.

John J. Wilson, of Los Angeles, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

Plaintiff was the owner and patentee of a well-casing protector, and on December 2, 1927, he entered into a contract with defendants Patterson and Ballagh, by the terms of which he granted to them the exclusive license to manufacture, use, and sell said patented article. Thereafter, in 1928, the said Patterson and Ballagh sold, assigned, and transferred all their rights as licensees under said contract to defendant Patterson-Ballagh, a corporation. It was provided by said contract that defendants should report to plaintiff on the 25th day of each month for all casing protectors sold and delivered by them during the preceding month, and pay to plaintiff on the 25th of each month a royalty on all well-casing protectors sold and delivered by said licensees during the preceding month. Defendants failed to report on the 25th day of April, 1933, for the sales and deliveries of said well-casing protectors for the month of March, 1933, or to pay to plaintiff the said royalty due him for said sales and deliveries for that period.

By the terms of said contract, failure to make such report and payment thirty days after receipt of written notice of default terminated the said agreement. On April 28, 1933, plaintiff gave defendants written notice of default, and thereafter, on the 31st day of May (the thirty days having

expired), he notified said defendants that said contract, by reason of said default, had terminated, and that they must cease to operate under the said license; it being provided by said contract that time was the essence thereof.

Thereafter, defendants continuing to manufacture and sell said well-casing protectors, and failing to report to plaintiff and account to him for his royalties, he commenced this action. Judgment was rendered for plaintiff annulling said agreement and enjoining said defendants from continuing to operate thereunder. From this judgment defendants have appealed.

Appellants contend that other persons, firms, and corporations have been engaged in the manufacture and sale of the well-casing protectors covered by the said patent, and by reason of said infringements appellants have suffered damage, and that by the terms of the contract it was the duty of the respondent to protect them from such infringements. That respondent conveyed to them a monopoly in the manufacture and sale of said well-casing protectors, and guaranteed that they should enjoy such monopoly during the life of the patent and that having failed to do this, he has breached the contract and is liable to appellants for all damages thereby caused.

Said contract provides that should the appellants be sued for the infringement of any patent, due to the manufacture by them of said invention, then and in that event respondent agrees that he will defend said action at his own cost, but should appellants desire to bring suit against any infringer of said patent, then in that event respondent agrees that the suit may be brought in his name, and he agrees to assist, in all reasonable ways, in the prosecution thereof, at the cost of appellants. In other words, if the validity of the patent is attacked, he will defend, at his own cost. On the other hand, if there is an infringement, he will permit appellants to bring suit in his name against those infringing, and agrees to assist in its prosecution. It is true he grants them the exclusive right to manufacture and sell the patented article, but he does not agree that he will protect appellants against infringements. The language of the contract negatives any theory that respondent would himself commence suit to stop infringement on the patent. It is only where the validity of the patent is involved that he is required to act. He grants them the exclusive license to manufacture and sell the said invention, and there is no evidence that he consented to, permitted or connived at the manufacture or sale of same by any other person.

[1] The law seems to be well settled that if, in the granting of a license to use or vend a patented invention, there is no express covenant that the licensor will protect the licensee from infringement, no such covenant can be implied to defeat the licensor's right to recover the stipulated royalties. Wilfley v. New Standard Concentrator Co. (C.C.A.) 164 F. 421; National Rubber Co. v. Boston Rubber-Shoe Co. (C.C.) 41 F. 48; McKay v. Smith (C.C.) 39 F. 556.

[2] As the contract contains no covenant, express or otherwise, to protect appellant against infringements, except where the validity of the said patent is involved, and no question of the validity of said patent is involved in this action, no duty rested upon respondent to stop any of the infringements relied on by appellants; and his failure to do so did not justify appellants in failing or refusing to make the reports or make the payments provided for in the contract.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

5 Cal.2d 182

550 PARK AVE. CORPORATION v. KUHE et al.

S. F. 15410.

Supreme Court of California.

Jan. 22, 1936.

Rehearing Denied Feb. 20, 1936.

1. Fraudulent conveyances ⇐299(12)

Evidence sustained judgment refusing to declare stock in pharmacy, incorporated by husband and wife, which was issued in name of wife who had contributed part of money used in purchasing pharmacy, property of husband and subject to execution under judgment against husband based on rent guaranty executed by him prior to incorporation.

2. Fraudulent conveyances ⇐47

Issuance of stock in pharmacy in husband's name at time of its incorporation to wife *held* not void transfer as to creditor of husband under statute relating to fraudulent transfers, because not accompanied by required notice, where testimony indicated that pharmacy belonged to wife at time of incorporation, and claim of creditor at that time rested upon possible future liability of husband on rent guaranty (Civ.Code, § 3440).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the 550 Park Avenue Corporation against Bruno K. Kuhe and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Alger, Peck & Grafton, of New York City, and James D. Whalen and Arthur J. Harzfeld, both of San Francisco, for appellant.

Richard O'Connor, of San Francisco, for respondents.

LANGDON, Justice.

Plaintiff recovered a judgment against defendant Bruno Kuhe in the sum of $7,139.33, and sought to levy execution on 397 shares of stock of H. L. Ladd, Chemist, Inc. Defendant Claire Kuhe, wife of defendant Bruno Kuhe, was the record owner of the stock, and claimed it as her separate property. Plaintiff then brought the present action to have the stock declared the property of the husband and subject to execution under its judgment.

[1] The evidence shows that in 1927 the husband was a licensed druggist in New York, and owner of the Dial Pharmacy there. He met the defendant Claire Pfau, who helped him with the business in a clerical and sales capacity. They agreed to marry, and arranged a marriage settlement to protect Miss Pfau because Kuhe had obligations toward a son by a former marriage. Miss Pfau thereafter assisted him actively in the business of the pharmacy. The parties entered into correspondence looking toward the purchase of the Ladd Pharmacy in San Francisco in March, 1928. They were married in April, 1928, and a short time later completed the transaction and opened the business. Mrs. Kuhe was active in the management from the beginning, drawing and signing nearly all of the checks. A certificate of doing business under a fictitious name was filed and published on April 30, 1928, with the husband named as sole owner. On March 23, 1929, he sold the Dial Pharmacy in New York, executing a guaranty of rent to plaintiff, which was the basis of liability under the present judgment. On April 20, 1929, the Ladd Pharmacy was incorporated, and all save a few shares were issued to Mrs. Kuhe.

Defendants testified that the greater part of the money used to purchase the San Francisco business belonged to Mrs. Kuhe before her marriage. She testified in detail as to the various banks and accounts from which the sums were withdrawn. The fact that Bruno Kuhe wrote the letter opening negotiations for the purchase is explained on the ground that Ladd, the owner, did not want to deal with a woman. Both parties testified that it was understood that any contributions made by the husband toward the purchase were to be by way of marriage settlement. There was evidence that the parties had corresponded with an attorney in Reno as early as May, 1928, with respect to incorporating the business.

Plaintiff contends that the evidence shows that the husband was the owner of the business, and that the taking of the stock in the name of the wife was a fraudulent transfer, void against it because at the time of incorporation Kuhe was under a contingent liability to plaintiff under the above-mentioned guaranty. Plaintiff, however, has produced very little evidence; its argument being mainly concerned with in-

ferences of fraud drawn from the allegedly suspicious acts of defendants. But defendants offered a detailed and credible explanation of their conduct, which the trial court believed; and in this state of the record plaintiff cannot prevail.

[2] Plaintiff also urges that, since the business was in the name of the husband at the time of incorporation, the issuance of shares to the wife was a void transfer under section 3440 of the Civil Code because not accompanied by a notice as required by that section. Bearing in mind, first, that, according to defendants' testimony, the business was actually the wife's at the time, and, second, that the plaintiff's status as a creditor rested solely upon the possible future liability of Kuhe on the guaranty, we think that no violation of the statute was established.

The judgment is affirmed.

We concur: WASTE, C. J.; CONREY, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 165

STILLWELL et al. v. JACKSON et al.

L. A. 13637.

Supreme Court of California.

Jan. 16, 1936.

1. Partition ⇨95

"Meander line" of description in decree for partition of shore property is line drawn and used as means of measuring and correctly locating shore line, and presumably would represent line of ordinary high tide of ocean.

[Ed. Note.—For other definitions of "Meander Line," see Words & Phrases.]

2. Judgment ⇨953

Evidence in suit to quiet title to shoreland *held* sufficient to sustain finding that land was included in prior decree of partition.

In Bank.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Suit by H. S. Stillwell and others against Ann G. Jackson and others. From an adverse judgment, named plaintiff and some of defendants appeal.

Affirmed.

See, also, 220 Cal. 364, 31 P.(2d) 196.

Butcher & Haines, of Santa Barbara, for appellant H. S. Stillwell.

Butcher & Haines and Norris Montgomery, all of Santa Barbara, for appellant Marguerite Goux.

Butcher & Haines and J. F. Goux, all of Santa Barbara, for appellant Robert E. Goux.

Schauer, Ryon & Goux, of Santa Barbara, for appellant Augustine Charles Goux, an infant, etc.

Heaney, Price, Postel & Parma, of Santa Barbara, for respondents J. R. Fithian and others.

A. C. Postel and John William Heaney, both of Santa Barbara, for respondents Neile F. Towner and others.

T. W. Haymond, of Los Angeles, for respondents Security-First Nat. Bank and others.

CONREY, Justice.

This is an appeal by H. S. Stillwell, plaintiff, and by Marguerite Goux, Robert E. Goux, and Augustine Charles Goux, a minor, defendants and cross-complainants, whose interests are identical with those of said plaintiff, from a judgment of the superior court of Santa Barbara county.

As shown by the pleadings of plaintiff and of said cross-complainants, they seek to quiet title to a narrow strip of land, which is part of a sand beach fronting on the Pacific Ocean, as against defendants who own lands adjoining said described parcel, and who claim that the said lands owned by them include the parcel of which appellants assert ownership in themselves.

All of the lands in controversy, as well as the adjoining lots of respondents, were formerly included in a large tract owned by the town of Santa Barbara. In the year 1866 this tract was conveyed by the town, by one deed, to several grantees, who thereby became owners as tenants in common of the entire tract. Appellants derive their claims of title from certain of those tenants in common, or their successors. Respondents, with respect to their several lots, deraign title from one or an-

other of said original grantees of the town of Santa Barbara.

In the year 1891, a certain action, Coyle et al. v. Southern Pacific R. R. Co. et al., was begun in the superior court, for partition of all of the land conveyed by said deed of the town of Santa Barbara. In the course of time that action was tried, an interlocutory decree ascertaining the several undivided interests was duly entered, commissioners were appointed, surveys made, commissioners' report filed, and a final decree was entered. It is admitted herein that in all of the partition proceedings, including the interlocutory decree, the strip of land claimed by appellants herein was part of the land which was sought to be and was ordered to be parceled out in severalty. The asserted title of appellants depends wholly upon the soundness of their contention that the land described in the complaint in this action was omitted from the final decree of partition in said former action.

In the final decree of partition there are several recitals and declarations which prove the continuing intention of the court to partition "the lands and premises mentioned in the complaint." If there was any failure to include all of that land, such failure must be ascribed to some error in describing one or more of the parcels, so that the court did not accomplish the announced purpose and intention of the decree. It can be only through some such error that any of the parties could have retained, as tenants in common, their title to the land now in controversy.

So far as germane to this case, the parcels designated in the final decree and shown on the partition map, are lots 1, 2, 3, 5, and 6. Appellant Stillwell claims under succession to Frances L. Packard, who received lots 1, 3, and 6. The other appellants claim under succession to J. E. Goux, who received lot 5, and Antonio Schiappa Pietra, who received lot 2.

The property described in the complaint and in the interlocutory decree in the partition suit was further identified therein as "being Survey No. 274, made by Wm. N. Norway, City Surveyor." The commissioners, in aid of their work, employed one Harrington to survey the land and make a map illustrating their report. In their report the commissioners made part thereof the Harrington map, as being a map "showing all the lands which we have been commissioned by this court to subdivide and allot, and the subdivisions thereof as directed by your commissioners."

Appellants contend that this manifest purpose of the final decree was not accomplished because, as they claim, the lots were described by metes and bounds and by the use of terms which excluded the land now claimed by them. The description of lot 1 will serve as an example. It begins at a redwood post, "set for corner in the sand hills, and being the southwest corner of a tract of land belonging to M. Lewis, and also the west corner of the tract in controversy in this suit; thence along the top of sand hills. 1st. S. 42¼° E. 37.77 chains to a 4x4 redwood stake set at the base of sand hills; thence, 2d; North 26.32 chains to a 4x4 redwood stake, set in fence on the south line of the strip of land heretofore alloted to the Southern Pacific Railroad Company"; thence by further courses and distances to the place of beginning.

The argument of appellants in support of their contention above stated is formulated in two propositions. These are: First, that a decree of partition is conclusive as to the extent and boundary of the land partitioned, and in the absence of any ambiguity in the decree the same cannot be extended or modified by judicial construction; and, second, that where a parcel of land is described by metes and bounds and the boundary line is fixed with reference to redwood posts and no mention is made of the ocean in front of the land, it cannot be said that said boundary line is a meander line.

[1,2] Let it be assumed that the first proposition is a correct statement of the law. Then the second proposition presents the principal question offered for solution. This proposition implies, and so concedes, that if in the final decree the ocean had been referred to in connection with the descriptive courses and distances which define the lines now the subject of controversy, then and in that case those lines reasonably might be taken as meander lines. For the purposes of such a decree, a "meander line" of description is a line drawn and used as a means of measuring and correctly locating the shore line. Presumably, in the absence of any other declared purpose, a meander line thus drawn would represent the line of ordinary high tide of the ocean. De Watson v. San Pedro, etc., R. Co., 169 Cal. 520, 147 P. 140.

But appellants claim that because the descriptions as written in the final decree do not show the existence of an adjacent Pacific Ocean, therefore the lines of description must be read without reference to such ocean, and that when so read, they cannot be construed as meander lines, or lines representing the shore line. Whatever of plausibility we might find in this argument, as applied solely and alone to the particular terms of description, is dissipated in the light of the character and intention of the decree as declared therein. When consideration is given to the entire record of that action, culminating in the declarations in the final decree itself, there remains no doubt that the lines of description on which the present controversy depends were meander lines representing the ordinary high water line of the Pacific Ocean. For the final decree refers to the report and partition as being "in accordance with the aforesaid interlocutory judgment"; and as being a proposed partition of "said lands" as required by the interlocutory decree. It was this report, thus described, which the final decree approved and confirmed. The report, and the previous record, beginning with the complaint and, including the interlocutory decree, in effect constitute one record, interlocked by references one to the other, and amply sufficient to show that the partitioned property and the several parcels thereof ran to the line of ordinary high tide. It follows that the findings of the trial court on this issue are supported by the evidence.

If we were at all in doubt about the interpretation of the instrument in question, and if there were any ambiguity to be dispelled by evidence aliunde, such evidence is found in the testimony of the witness Frank F. Flournoy, former county surveyor, who ran the lines of the Harrington survey and prepared the partition map.

In addition to the defense of respondents in relation to the issues hereinbefore discussed, they also pleaded that the right of action of appellants was barred by the provisions of section 318 of the Code of Civil Procedure and also pleaded several other defenses, including the statute of limitations and the defense of laches on the part of appellants prior to commencement of this action. The trial court found in favor of respondents not only with reference to the effect of the partition decree but also on the additional defenses. Each and all of these findings of the trial court and its conclusions thereon are the subject of attack by appellants in their argument on this appeal. Since by reason of the decision herein announced on the primary issues of the case we are satisfied that the claim of title on the part of appellants is without merit, it becomes unnecessary to discuss the questions raised with respect to said additional defenses.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



5 Cal.2d 211

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. GIANELLA et ux.

Sac. 4894.

Supreme Court of California.

Jan. 24, 1936.

Mortgages ⊂=335

Where bank holding notes secured by securities demanded and received trust deed as additional security, foreclosure of trust deed *held* not invalidated because notice of breach was recorded before securities were sold, where foreclosure sale was had after marketable portion of securities was sold which did not bring amount of debt.

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the Bank of America National Trust & Savings Association against Henry Gianella and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Oscar Goldstein, of Chico, for appellants.

Jerome D. Peters, of Chico, for respondent.

CONREY, Justice.

Appeal by defendants from judgment for plaintiff in action in ejectment and to quiet title to some 513 acres of ranch property in

Butte county. The words "plaintiff" and "bank" are used to refer to both plaintiff bank and its predecessors. When we refer to defendant Gianella, we shall intend defendant Henry Gianella.

Plaintiff's title was acquired through a sale made under a trust deed given by defendants to secure two overdue notes of defendant Henry Gianella to the plaintiff. No claim is made that the sale and the proceedings leading to the sale, considered by themselves alone, were not in due form sufficient to pass the title, unless the right of the trustee to make the sale was defective by reason of the facts to which reference will be made.

Appellants in their statement of questions involved in this appeal state two questions which in effect present two propositions upon which appellants rely. These propositions are, first, that where a bank under a collateral security agreement held certain negotiable instruments as security for two notes, and later demanded and received a deed of trust as additional security for the same notes, the bank was not justified in foreclosing the deed of trust, the notice of breach having been recorded three months before any collateral was sold under the collateral agreement; second, that where a plaintiff bank sued the defendants in ejectment, the trial court did not have the right to make findings of fact on issues not within the pleadings and having no relation to the judgment.

Disposing first of the second proposition, it is sufficient to say that there were no such findings of fact which if erroneously made furnish any good reason for reversal of the judgment; also, that appellants in their brief have not pointed out any discrepancy between pleadings and findings, and have made no argument in support of their contention.

In 1931 defendant Gianella was indebted to the bank in a principal sum of $22,750, represented by two demand notes of $18,000 and $4,750, respectively; and in addition he had with one Jones become jointly obligated to the bank on notes amounting in the aggregate to $11,500. He had deposited with the bank as security for these notes bonds of the aggregate face value of $8,000, and 549 shares of capital stock of Transamerica Corporation. Default having occurred on the $18,000 note, the defendants on October 26, 1931, at the request of the bank, executed for its benefit a deed of trust on their ranch property, subject to a prior deed of trust in favor of other parties. In September, 1932, all of the notes were due both as to principal and as to interest. On September 3 the bank set in motion proceedings to foreclose the deed of trust. Notice of breach and election to sell thereunder was recorded September 5, 1932; and notice of sale was posted December 7, 1932, fixing January 6, 1933, as the date of sale. Prior to the day of sale, but subsequent to the posting of notice thereof, the bank sold all of the stocks and bonds, with one exception, and received therefor total net proceeds of $5,217.79. Part of this was applied to satisfy the Gianella and Jones notes, and the balance was applied on the Gianella notes. The one item not sold consisted of four Caribbean Sugar Company bonds of $1,000 each par value. It appears that these were omitted from the sale because they were in default and had been deposited by the bank with a bondholders' committee.

In support of the proposition of appellants that under these circumstances the bank was without right to foreclose the deed of trust, they contend that the deed of trust was a secondary security which could not be enforced without first exhausting the primary security by sale of the pledged personal property. The court found that said deed of trust was not accepted by the plaintiff as secondary security for the Gianella notes, nor was there any agreement, express or implied, that the plaintiff would exhaust the pledged security first and prior to realizing upon the deed of trust; also it found that the deed of trust was accepted as security for the payment of the Gianella notes, and it was understood by the defendants that the plaintiff might proceed to exhaust the security of the said deed of trust at any time during which defendants were in default.

We think that the evidence is sufficient to support these findings. Turning to the terms of the notes themselves, the collateral agreement and the trust deed, we find therein no provision or agreement, express or implied, that they were to constitute respectively a primary and a secondary security. The testimony of the plaintiff's branch manager who supervised the loans in question shows that the bank requested Gianella to give other security besides that which the bank had. Having received such security, the bank delayed adverse proceedings for approximately a year.

But even if the trust deed were to be regarded as secondary security, we see no rea-

son why the bank should have been debarred from taking a step altogether preliminary to the sale under the trust deed before it was determined through a sale how much could be realized on the primary securities. The trustee did not actually sell the real property covered by the trust deed until it had disposed of the collateral, or so much thereof as was marketable at that time. It further appears that after the sale of the stocks and bonds, and after the sale under the trust deed, there still remained unpaid on the Gianella notes a balance of more than $11,000.

From the facts hereinabove set forth, it is our conclusion that there was a valid sale under the trust deed, and that the deed of conveyance made pursuant thereto vested title in the plaintiff, and that there is no error in the decision or judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.

5 Cal.2d 170

JACOBSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 15139.

Supreme Court of California.

Jan. 16, 1936.

1. Courts ⇐472(6)

Municipal courts have exclusive jurisdiction under statute over all cases in which equitable matters are pleaded as defense, when original jurisdiction of such cases is in municipal court (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

2. Courts ⇐188(3)

Filing of cross-complaint in action properly within jurisdiction of municipal court, which pleaded equitable matters of defense only, *held* not to oust municipal court of jurisdiction and confer jurisdiction on superior court (Code Civ.Proc. § 396, and § 89, as amended by St.1933, p. 1811).

In Bank.

Petition by Hastrup L. Jacobson for writ of mandamus against the Superior Court of the State of California, in and for the County of Los Angeles.

Writ issued.

Prior opinion, 46 P.(2d) 755.

Ralph G. Lindstrom, Arthur H. Glanz, and Betty Marshall Graydon, all of Los Angeles, for petitioner.

Gibson, Dunn & Crutcher, Keith Bullitt, Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, all of Los Angeles, for respondent.

CURTIS, Justice.

The facts in this case are correctly set forth in our former opinion as follows:

"The petition seeks the writ of mandamus to compel the respondent superior court to transfer a cause pending therein to the municipal court of the city of Los Angeles. A general demurrer to the petition has been interposed.

"On September 20, 1934, the petitioner brought an action in the respondent superior court entitled Hastrup L. Jacobson, plaintiff, v. Ætna Life Insurance Company, defendant, numbered 378428 in the files of said court. In said action the plaintiff sought to recover a judgment in the sum of $1,300 and interest, representing the amount alleged to have accrued pursuant to the provisions of an insurance policy providing for payment of $50 per month on account of the permanent total disability of the plaintiff, plus the sum of $81.20 paid as premiums since the disability the payment of which it was alleged was waived by the terms of the policy. The amounts thus sought to be recovered, plus interest, aggregated less than $2,000. The plaintiff also sought a declaratory judgment that he was entitled to future payments of $50 per month during the period of permanent total disability.

"On October 31, 1934, this court filed an opinion and order in the case of Brix v. People's Mutual Life Insurance Company, 37 P.(2d) 448. In that case a similar action was filed in the superior court in San Francisco wherein the plaintiff sought to recover sums accrued under a similar policy, and installments to become due in the future. Judgment had been entered in that case for the sums which had become due under the policy, aggregating $1,300, also for sums to become due in the future. In the opinion then filed in that case it was held that the plaintiff was not entitled to

recover installments which had not accrued, that he could not obtain a judgment therefor by resort to the declaratory relief statute, and that the plaintiff consequently was not entitled to a judgment for the future installments. The decision on that branch of the case was not disturbed in the opinion filed on rehearing. [2 Cal. (2d) 446] 41 P.(2d) 537.

"In November, 1934, the petitioner herein filed in the action of Jacobson v. Ætna Life Insurance Company an amended complaint, omitting however, the allegations and prayer with reference to declaratory relief. In December, 1934, the defendant in the action filed an answer and a cross-complaint whereby it sought the cancellation of the policy by reason of the assured's alleged failure to continue payment of the premiums and the alleged consequent lapsing and termination of the policy. Thereafter, the petitioner made a motion that the cause be transferred to the municipal court on the ground that the superior court did not have jurisdiction of the cause, but that jurisdiction thereof was exclusively in the municipal court. The respondent court denied the motion and will proceed to try the action unless directed to transfer the same to the municipal court pursuant to section 396 of the Code of Civil Procedure."

The case in its essential facts is much like the case of Brix v. People's Mutual Life Insurance Company, supra. In that case the action there involved was begun in the superior court. As the amount recoverable was less than the amount necessary to give that court jurisdiction, the case was properly within the jurisdiction of the municipal court. However, the defendant in that case filed a cross-complaint setting up equitable matters, and it was held that by reason of that fact, the case was properly retained and tried in the superior court. But the Brix Case was decided upon appeal from a judgment entered prior to the amendment of section 89 of the Code of Civil Procedure in 1933. This section as amended provided that: "Each municipal court shall have jurisdiction of all cases in equity when pleaded as defensive matter, in any case properly pending in such municipal courts." Under this section as it now reads, the jurisdiction of the municipal court has been extended to include the determination of any equitable issue when pleaded as defensive matter in any case properly triable in such municipal court. The matters therefore contained in the cross-complaint in said action, if they are mere matters of defense, were properly cognizable by the municipal court, and the jurisdiction over said case was in that court and not in the superior court. By an examination of the pleadings filed in said action it conclusively appears that the equitable matters pleaded therein merely tend to show that the plaintiff therein was not entitled to recover anything whatever on said policy of insurance for the reason that he was in default in the payments of the premiums called for by said policy. These matters were merely defensive matters and therefore properly cognizable by the municipal court as provided by the 1933 amendment to said section 89 of the Code of Civil Procedure. It is true that said defendant in its cross-complaint prayed for a judgment declaring "that said policy has become cancelled and terminated" and "that all rights under said policy ceased." The result of such declaration would be a judgment that the plaintiff in said action take nothing. By the prayer of its answer the defendant asked for a judgment "adjudging said policy terminated." No affirmative relief is asked for in the cross-complaint that is not also asked for in the answer, and the issues arising out of the complaint and answer in said action are the same as those made by the cross-complaint and answer thereto. In each instance the matters pleaded are matters of defense only. The language, therefore, in the case of Pacific Finance Corporation v. Superior Court, 219 Cal. 179, 182, 25 P.(2d) 983, 90 A.L.R. 384, cited in respondent's brief is not controlling or even applicable to the situation before us.

[1, 2] Our attention is called to the recent case of Tennesen v. Prudential Insurance Co. (Cal.App.) 47 P.(2d) 1066, 1068, containing language indicating that the 1933 amendment to said section 89 only applies to actions actually pending in municipal courts and not to actions which are improperly brought in superior courts and which are pending therein at the time of the filing of a pleading setting up equitable defensive matters. We think this is entirely too narrow a construction to be placed upon this provision of the section. On the other hand, it seems clear to this court that the object of this amendment to the section was to give to municipal courts exclusive jurisdiction over all cases in which equitable matters are pleaded as a defense, when the original jurisdiction of

such cases is in the municipal court. The language relied upon by respondent in the Tennesen Case was not necessary to the decision therein and cannot be regarded as an authoritative determination of the meaning of said section as amended. In that case, which was commenced in the superior court, the plaintiff asked for equitable relief in his complaint. The action was therefore properly pending in the superior court, and the District Court of Appeal very properly held that "the mere filing of pleadings which raise equitable defenses does not oust the superior court of jurisdiction nor thereby confer jurisdiction on the municipal court." We have an entirely different situation before us in the present proceeding. After the filing of the amended complaint in the action of Jacobson v. Ætna Life Insurance Company, the superior court had no jurisdiction of the case. The case was properly one for the municipal court, and the filing of the cross-complaint which raised an equitable defense did not oust the municipal court of jurisdiction, and confer it upon the superior court. This is the plain intent and purpose of section 89 of the Code of Civil Procedure as amended in 1933.

Let the writ of mandate issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CONREY, J.



5 Cal.2d 185

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

S. F. 15455.

Supreme Court of California.

Jan. 22, 1936.

Rehearing Denied Feb. 20, 1936.

Master and servant ⇐373, 375(1)

Death by asphyxiation of traveling salesman occurring while he was spending night in automobile camp cabin while returning from sales trip, when he lighted gas heater and closed windows and doors, *held* compensable as "arising out of and in course of employment" (Gen.Laws 1931, Act 4749, § 6 (a).

[Ed. Note.—For other definitions of "Arising out of Employment" and "Course of Employment," see Words & Phrases.]

In Bank.

Certiorari to Industrial Accident Commission.

Application by the California Casualty Indemnity Exchange for a writ of certiorari to review an award of the Industrial Accident Commission of California under the Workmen's Compensation Act in favor of Dorothy Marie Monahan and another, surviving widow and child of Charles Monahan, deceased.

Award affirmed.

For prior opinion, see 43 P.(2d) 832.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for petitioner.

E. A. Corten and A. I. Townsend, both of San Francisco, for respondent Industrial Accident Commission.

Edmund D. Leonard, of San Francisco, for respondents Dorothy Marie and Lucile Rose Monahan.

CONREY, Justice.

Proceeding upon writ of review to secure annulment of death benefit award made by Industrial Accident Commission in favor of the widow and child of Charles Monahan, deceased.

The facts are undisputed. On January 26, 1934, the said employee, a traveling salesman, in the course of his return from a northern sales trip, arrived at Santa Rosa about 9 o'clock in the evening and secured sleeping accommodations at an auto camp, where he met death by asphyxiation, in the following manner: He was suffering from a cold and upon retiring to the cabin assigned to him, closed all windows and doors and lighted the gas heater, a heater properly adjusted and provided with a vent to insure the escape of poisonous gas caused by incomplete combustion. When he went to bed he failed to open any of the windows or doors, or to shut off the heater. Said heater, burning over a long period without ventilation, exhausted the fresh air in the room

and caused his death from carbon monoxide poisoning. The next afternoon, as decedent had failed to put in an appearance, his cabin was forcibly entered. The heater was still burning "full tilt" and his body was found in the bed. Autopsy revealed that death resulted from the cause aforesaid.

Only two questions are presented: First, did the death of the employee occur in the course of his employment? Second, did such death arise out of the employment? Both elements must be present to sustain the award. Workmen's Compensation, etc., Act, 2 Deering's Gen. Laws 1931, Act 4749, § 6(a).

There seems no reason for denial that the death of the employee occurred in the course of his employment. "As a rule commercial travelers may be regarded as acting in the course of their employment so long as they are traveling in their employer's business, including the whole period of time between their starting from and returning to their place of business or home." Bradbury on Workmen's Compensation, p. 105. Within this rule the traveler, when overtaken by night, may reasonably seek the protection of an inn and still be regarded as acting in the course of his employment.

But it is contended that there was no causal connection between any acts done by Monahan reasonably within the scope of his employment, and the death which followed, and therefore that it cannot be said that the death arose out of the employment. Certainly it must be conceded that in connection with his occupancy of the cabin the employee might reasonably arrange for his comfort and convenience by using the heater furnished for the purpose of regulating the temperature of the room. And if in connection with his use of those conveniences some accident should occur, the general rule would be that injury caused thereby would be injury arising out of the employment.

The contention here made by petitioner does not seriously question the rule as thus far stated. But petitioner says that the act of decedent in failing to ventilate the cabin or shut off the heater, when to any rational mind it would be patent that such course would inevitably bring about injury or death, was so unauthorized and unreasonable as, in effect, to remove him from the scope of his employment. It is practically impossible to distinguish this contention from a claim that the death of the employee was caused by his own negligence. We must conclude that petitioner refrains from admitting this fact because it is so well known that negligence of the employee is no defense to a compensation claim of the kind presented in this case.

It thus appearing that the Industrial Accident Commission acted entirely within the limits of its jurisdiction in this matter, therefore the award is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



10 Cal.App.2d 685

SAN FRANCISCO BRIDGE CO. v. CHARLES NELSON CO. et al.

Civ. 9407.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1936.

Towage ⇐15(3)

Owner of derrick barge, which, with property stowed thereon, was lost at sea, due to tower's negligence, could not recover from tower value of tractor, plow, and scraper, which were not part of barge's regular or accessory equipment.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

On petition for rehearing.

Petition denied, and original opinion [52 P.(2d) 978] modified.

Irving H. Frank, Nathan H. Frank, and L. C. Gay, all of San Francisco, for appellants.

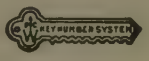
Lillick, Olson, Levy & Geary and Theodore M. Levy, all of San Francisco, for respondent.

PER CURIAM.

It is ordered that the opinion heretofore filed herein be and the same is hereby modified by striking therefrom the words "Judgment affirmed" at the end of the opinion and by inserting after the word "Griffdu" on the last line of the opinion the following:

Certain articles including an orange peel bucket, etc., were suitable for use and had been used on "the barge." Other articles, namely, a Fordson tractor valued at $300, a plow valued at $90, and a scraper valued at $90, were not a part of the regular or accessory equipment of the barge. The amount of the judgment is therefore reduced to the sum of $12,020; and, as thus modified, the judgment will stand affirmed, respondent to recover its costs of appeal.

The petition for rehearing is denied.



11 Cal.App.2d 307

ROSS v. STORY.

Civ. 10311.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Rehearing Denied Feb. 17, 1936.

Hearing Denied by Supreme Court March 16, 1936.

1. Automobiles ⇐244(7, 55)

In action for injuries to boy struck by automobile, evidence *held* to sustain findings that motorist was negligent and boy free from contributory negligence.

2. Appeal and error ⇐758(3)

Alleged errors in giving instructions would ordinarily not be considered where appellant in brief printed none of other instructions given on same subject and none of evidence pertinent to criticisms (Rules of District Court of Appeal, rule 8, § 3).

3. Trial ⇐296(4, 5)

In action for injuries to boy struck by automobile, defective instruction on standard of care required, which omitted subject of contributory negligence, *held* cured by other instructions.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Robert R. Ross, by W. A. Ross, his guardian ad litem, against William Story. Judgment for plaintiff, and defendant appeals.

Affirmed.

John L. Fleming, of Los Angeles, for appellant.

Lloyd S. Nix and Lilian M. Fish, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

This appeal results from a judgment for plaintiff entered upon a verdict of a jury in an action to recover damages for personal injuries suffered by plaintiff, a minor of the age of 10 years, arising out of a collision between plaintiff, a pedestrian, and defendant's automobile, at or near the intersection of Vermont and Florence avenues in the city of Los Angeles, at 7 o'clock on the evening of February 19, 1934. Immediately prior to the accident, defendant was driving his automobile south on Vermont avenue; approaching the intersection of Vermont and Florence, the lights being green, he made a right-hand turn westerly on Florence, which latter street is 70 feet wide from curb to curb. It was raining, and the streets were wet. The intersection, however, was well lighted. Plaintiff was wearing a leather jacket, boots, and his father's rain hat, which was something like a fireman's hat. According to plaintiff's testimony, he had been standing at the north curb on Florence avenue at Vermont waiting for the lights to change. When they changed to green, he stepped off the curb at the north curb line of Florence avenue, and proceeded across Florence in a southerly direction. Plaintiff testified that he stepped off the curb into the pedestrian zone and continued to travel therein. Defendant contended that the boy stepped off the north curb line at a point 30 to 35 feet west of the westerly curb line of Vermont avenue, and that he did not know that he had struck plaintiff, admitting, however, that he knew he hit something, but thought he ran over a traffic button. It is difficult to accept this contention, in view of defendant's admission that the only impact he felt was 30 to 35 feet west of the west curb line of Vermont avenue, and for the further reason that defendant testified he knew there was no traffic button there. Further, physical evidence showed that the westerly edge of the largest pool of blood in the street was five steps west of the center of the crosswalk and nine steps south of the

northerly curb of Florence avenue. The physical evidence corroborates plaintiff's theory that he was first struck by the automobile, thrown a few feet, and then run over. After his car had struck plaintiff, defendant did not stop, but was followed by a witness, who saw the left wheels of defendant's car run over the boy. Defendant was overtaken about one-half mile west of Florence avenue. There was evidence that the defendant had been drinking and was intoxicated at the time (defendant admitted he had taken two drinks of gin), and that the windshield wiper on defendant's automobile was not, and for some time had not been, operating, that the entire windshield was dirty, and that the brakes were bad. The evidence also showed that defendant's automobile had a depression on the left side of the radiator cap, that the left headlight was bent back and polished off on the inside, and that the left side of the bumper had been polished off in front, but the rest of the bumper was dirty. There were no eyewitnesses to the actual impact between the automobile and the boy, although, as already stated, one of the witnesses saw the left wheels of defendant's automobile run over the boy's body. Defendant's contention in this respect is that the boy slipped and fell in front of his automobile. There is no direct evidence as to the speed of defendant's automobile at the time of the impact, but there is testimony to the effect that the witness, who pursued defendant, had to travel 50 miles per hour to overtake the defendant, and there is nothing in the record to show whether or not defendant increased or decreased his speed after the impact.

The case was tried before a jury which brought in a verdict for the plaintiff. From the judgment entered thereon, this appeal is taken.

[1] Defendant's first contention is that there is no substantial evidence showing negligence on his part. We feel that the foregoing recital of facts briefly made demonstrates, upon a mere reading thereof, sufficient substantial evidence to have justified the jury in concluding that there was negligence on the part of defendant proximately causing the collision in question, and that there was no contributory negligence on the part of the plaintiff.

[2] Defendant next contends that certain instructions given by the court were so erroneous and prejudicial as to constitute reversible error.

This court said, in Mills v. Los Angeles Junk Co., 3 Cal.App.(2d) 546, at pages 548, 549, 40 P.(2d) 285, 286: "Appellant in his brief prints none of the other instructions given on the same subject and prints none of the evidence pertinent to such criticisms. * * * Such a presentation does not comply with section 3 of rule VIII of the rules adopted by the judicial council of this state for this court, and it has been repeatedly held that appellate courts will decline to give consideration to instructions thus generally criticized. Swartz v. Feddershon, 92 Cal.App. 285, 291, 268 P. 430; Scott v. Times-Mirror Co., 181 Cal. 345, 371, 184 P. 672, 12 A.L.R. 1007; Born v. Castle, 175 Cal. 680, 685, 167 P. 138; Vance v. Gilbert, 178 Cal. 574, 580, 174 P. 42; Gavin v. Gavin, 92 Cal. 292, 28 P. 567; Phœnix, etc., v. Texas Holding Co., 81 Cal.App. 61, 76, 252 P. 1082."

[3] The foregoing observations as to the facts in the cited case and the law applicable thereto is of equal pertinence here. We have, however, examined the record and scrutinized all criticisms made by appellant. The first instruction criticized is respondent's No. 9, which is as follows: "I further instruct you that if from all the evidence you find that the defendant William Story was not using all the care and caution in operating his automobile at the time and place of this accident which a careful and prudent man similarly situated should exercise, having due regard of the safety of the public and the rights of others to the use of Vermont Avenue and Florence Avenue, and if you further find that defendant William Story's lack of due care and caution, if any, contributed proximately to the injuries, if any, sustained by the plaintiff, Robert R. Ross, I direct you to bring in your verdict for the plaintiff and against the defendant." Standing alone, this instruction is undoubtedly defective. Corvello v. Baumsteiger, 115 Cal.App. 194, 1 P.(2d) 484; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700; Starr v. L. A. Ry. Corp., 187 Cal. 270, 201 P. 599. The jury, however, was adequately instructed upon the standard of care required and upon the subject and effect of contributory negligence. Plaintiff's instructions 6, 16, and 3, and defendant's instructions 3, 4, 5, 8, and 14 could have left

no doubt in the minds of the jury as to what constituted contributory negligence, and the effect thereof. We find no prejudicial error of any kind in plaintiff's instructions 12, 13, 20, and 27. Plaintiff's instruction 3, if there is any defect, is completely cured by plaintiff's instruction 5 and by defendant's instructions 4, 5, and 6. The slight irregularity in plaintiff's 25 is cured by the third paragraph of plaintiff's 1 and by defendant's 2. We find no irregularity in plaintiff's 26, but, if there is any, it is eliminated by plaintiff's 1 and 27, and by defendant's 1 and 2.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 283

BATTSON v. KIRKPATRICK.

Civ. 10658.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1936.

1. Appeal and error ⇐761

Where appellant failed to present each point separately under an appropriate heading, showing nature of question to be presented and point to be made, appeal would be dismissed (Rules of the District Court of Appeal, rule 8, § 2).

2. Appeal and error ⇐722(1)

Assignment of error should take form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of judgment (Rules of the District Court of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit by Leigh M. Battson against John L. Kirkpatrick. From a judgment for plaintiff, defendant appeals.

Appeal dismissed.

F. E. Davis, of Hollywood, for appellant.

O'Melveny, Tuller & Myers and B. E. Ahlport, all of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after a trial before a court without a jury.

[1, 2] Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made. Sec. 2, rule VIII, of the District Court of Appeal. Mr. Justice Conrey, in Adams v. Standard Accident Ins. Co., 124 Cal.App. 393, at page 394, 12 P.(2d) 464, then Presiding Justice of the District Court of Appeal, Second Appellate District, Division One, in commenting upon this provision of rule VIII, supra, accurately states the requirement thus: "Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

Appellate courts cannot be expected to assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, supra, and by argument and citation of authorities to show that the claimed error exists.

For the foregoing reasons, the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

HILD v. JUSTICE'S COURT OF STOCKTON TP., SAN JOAQUIN COUNTY et al.*

Civ. 5533.

District Court of Appeal, Third District, California.

Jan. 15, 1936.

Hearing Denied by Supreme Court March 12, 1936.

1. Appeal and error ⇐781(4)

Appeal from order sustaining demurrer to petition for writ of mandamus seeking to recall and quash writ of execution which had been issued to satisfy a judgment was dismissed as moot, where subsequent to perfecting of appeal execution was levied and judgment satisfied.

2. Appeal and error ⇐781(1)

Moot questions will not be reviewed or determined on appeal.

3. Appeal and error ⇐797(1)

Motion to dismiss appeal on ground that question involved had become moot was not premature because made before time allowed by court rule for appellant to file points and authorities, since rule refers only to motions for dismissal for failure to file transcript or brief (Rules for Supreme Court and District Courts of Appeal, rules 1, 5, § 1).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Mandamus proceeding to recall and quash a writ of execution by M. William Hild, doing business under the firm name and style of Hild Electric & Manufacturing Company, against the Justice's Court of Stockton Township, County of San Joaquin, State of California, and others. From an order sustaining a demurrer to the petition, the petitioner appeals. On motion to dismiss appeal.

Appeal dismissed.

For prior opinion, see 52 P.(2d) 251.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for appellant.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for respondents.

PER CURIAM.

The respondents have moved to dismiss this appeal on the ground that the issues which are presented thereby have become moot.

In a suit which was pending in the justice's court of Stockton township, entitled Rossi v. Hild, a judgment for the sum of $350 and costs was rendered against this petitioner. On the theory that the judgment was void for lack of jurisdiction a writ of mandamus was subsequently filed in the superior court of San Joaquin county, seeking to recall and quash a writ of execution which was issued in that case to satisfy the judgment. The respondents demurred to the petition for a writ of mandamus on the ground that it fails to state facts sufficient to state a cause of action. The demurrer was sustained without leave to amend the petition. From the order sustaining the demurrer, the petitioner appealed to this court. Subsequent to the perfecting of an appeal to this court in the mandamus proceeding, the execution was levied and the judgment of the justice's court was fully satisfied.

[1] The respondents moved to dismiss this appeal on the ground that the issues have become moot, by virtue of the subsequent levying of the execution and complete satisfaction of the judgment in question. The motion is supported by affidavits to that effect. These affidavits are not controverted. The issues which are presented on appeal in this proceeding having become moot, it is evident that the motion to dismiss the appeal should be granted.

[2] An appellate court will not review or determine questions on appeal which are moot for the reason that the decision of such questions is idle and serves no useful purpose. Bley v. Board of Dental Examiners of California, 101 Cal.App. 666, 282 P. 19; 2 Cal.Jur. p. 749, § 437, and p. 803, § 472; Moore v. Morrison, 130 Cal. 80, 62 P. 268.

In 2 California Jurisprudence, p. 750, § 737, above cited, it is said in that regard: "The questions presented by an appeal become moot, and the appeal will be dismissed when the judgment has been satisfied."

[3] The motion to dismiss the appeal in the present case was not premature for the reason that it was made before the time allowed by rule 1 of the Rules for Supreme Court and District Courts of Appeal for appellant to file his points and authorities in this court. Rule 5, upon which the appellant relies in support of that assertion that the motion to dismiss the appeal was premature, refers only to mo-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 55 P.(2d) 198.

tions for dismissal of appeals for failure to file the transcript or briefs on appeal. Neither the court rules nor the general law prescribes the time within or after which a motion may be made to dismiss an appeal on the ground that the issues have become moot. In the present case it appears by affidavit, which is not controverted, that the issues presented on this appeal have become moot and that the writ of mandamus prayed for cannot issue for the reason that the execution sought to be restrained has been levied and the judgment in question fully satisfied. It therefore becomes idle and useless for the court to consume further time in considering the issues presented by the appeal.

The appeal is dismissed.



11 Cal.App.2d 320

MOTION PICTURE MAKE-UP ARTISTS ASS'N v. ASSOCIATED MOTION PICTURE MAKE-UP ARTISTS, Inc., Limited, et al.

Civ. 9560.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Trade-marks and trade-names and unfair competition ⇐93(3)

Evidence *held* insufficient to support judgment granting injunction to nonprofit corporation engaged in art of make-up of moving picture actors under name of "Motion Picture Make-Up Artists Association" against use of name "Associated Motion Picture Make-Up Artists, Inc., Limited," by corporation engaged in manufacture and sale of cosmetics.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Motion Picture Make-Up Artists Association against the Associated Motion Picture Make-Up Artists, Inc., Limited, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Sparling & Teel, of Los Angeles, for appellants.

YORK, Justice.

The plaintiff, a nonprofit corporation composed of fifty-five members engaged in the art of making up moving picture actors and actresses to prepare them for the taking of moving pictures and appearances on the stage, brought action against the defendant corporation to enjoin and restrain it from using the name of Associated Motion Picture Make-Up Artists, Inc., Limited, and also to enjoin it from doing business under said name or using the name in any manner whatsoever. The defendant corporation is a commercial enterprise engaged in the manufacture and sale of all kinds of cosmetics, and in connection therewith has been accustomed to demonstrate the use of its cosmetics upon the persons of motion picture actors and actresses and the public generally.

The cause went to trial upon plaintiff's second amended complaint and the defendants' answer thereto. The material allegations of the complaint were generally and specifically denied, and in addition a separate equitable defense was set up by the answer. Evidence consisting of the articles of incorporation of the plaintiff was introduced and the findings recite—but without any basis therefor shown in the record—that "the cause submitted for decision on the pleadings and statements of counsel."

From a judgment by which the defendants were enjoined and restrained from the use of the name Associated Motion Picture Artists, Inc., Limited, this appeal is prosecuted.

Appellants contend that the judgment rendered is without any basis in law, for the reason that the findings are not supported by any evidence, that the complaint did not state facts sufficient to constitute a cause of action, and that the trial court erred in overruling the general demurrer to the second amended complaint, and that the decision is against law because the findings are not substantially coextensive with the issues joined by the pleadings, and particularly are there no findings upon the equitable matters set up in defendants' answer by way of separate defense.

The record before us shows that no evidence was adduced upon the trial, except the articles of incorporation of the plaintiff, and the findings show that the cause was submitted by the trial court "on the pleadings and statements of counsel." As heretofore stated in this opinion, the material

allegations of the complaint were denied generally and specifically by the answer. No admissions of any material facts were made nor were any stipulations entered into by the parties. The statements of counsel herein referred to appear to be in the form of arguments made by the attorneys for both parties before the trial court.

There is a total lack of evidence or stipulation to support the findings made by the trial court. We deem it unnecessary to consider the other points raised by appellants.

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



11 Cal.App.2d 322

NIX v. WOODWORTH et al.

ENGLE v. SAME.

Civ. 9440.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Rehearing Denied Feb. 13, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Automobiles ⇐167(2, 3)

Motorist approaching highway from private drive must sound horn and give warning of intention to come into street without conceding right of way to approaching traffic (St.1929, p. 542, § 132).

2. Automobiles ⇐206

Driver of motorcycle and passenger thereon had right to assume that motorist driving into street from filling station would not suddenly increase speed in crossing highway in path of motorcycle and take right of way without warning (St.1929, p. 542, § 132).

3. Automobiles ⇐151

Rider of motorcycle proceeding lawfully upon highway was under obligation to sound horn only in event warning appeared necessary.

4. Automobiles ⇐245(78, 82)

In action for injuries received by motorcycle rider and passenger when defendant drove automobile out of filling station into path of motorcycle without sounding horn, contributory negligence of rider of motorcycle in failing to sound horn, abate speed, or turn away from automobile *held* for jury (St.1929, p. 542, § 132).

5. Trial ⇐295(7)

Instruction on last clear chance doctrine *held* not prejudicial error as inapplicable to facts, where jury was told that whole instruction was inapplicable unless jury found that new and intervening act of negligence of defendant was sole and proximate cause of accident.

6. Automobiles ⇐245(53)

In action for injuries received by rider of motorcycle and passenger thereon when defendant drove automobile from filling station across highway into path of motorcycle without warning, evidence that negligence of defendant was sole proximate cause of accident *held* for jury (St.1929, p. 542, § 132).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Two actions by R. E. Nix and W. H. Engle against O. C. Woodworth and another. Judgments for plaintiffs, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Finlayson, Bennett & Morrow, Henry L. Knoop, and H. Eugene Breitenbach, all of Los Angeles, for appellants.

Jones, Stephenson, Palmer & Moore, of Los Angeles (C. Arden Gingery, of Los Angeles, of counsel), for respondents.

YORK, Justice.

The plaintiffs in separate actions sued the defendants for damages on account of personal injuries sustained by them in a collision between a motorcycle, which was being driven by plaintiff Engle and on which the plaintiff Nix was riding as a passenger, and an automobile, which was owned by defendant Woodworth and which was being operated by defendant Henning with the permission of defendant Woodworth.

The two actions were tried concurrently, and each resulted in a verdict and judgment in favor of the plaintiff therein in the sum of $15,000, of which amount the first $5,000 was assessed against both defendants, and the remaining $10,000 was assessed against defendant Henning only. The appeals of defendants from these two judgments are presented here in the form of a consolidated bill of exceptions.

It appears from the record that the plaintiffs, with plaintiff Engle driving, were proceeding from Los Angeles to Tujunga on a motorcycle, via Glendale boulevard to the point where it runs into Verdugo road,

where they stopped to smoke. They then proceeded northerly on Verdugo road to the point where Canada boulevard intersects said Verdugo road at an angle to the west. Defendant Henning, with his wife seated beside him, was driving an automobile northerly on Verdugo road, and, when he reached the intersection of Verdugo road and Canada boulevard, he made a left-hand turn into a service station, which is located at the flatiron intersection of the two named boulevards, proceeded westerly through the service station to the driveway on the easterly curb of Canada boulevard and started in low gear across the boulevard to the west in order to make a southerly turn into Canada boulevard. Meanwhile the motorcycle was approaching the intersection at a speed of approximately 35 miles per hour, making a gradual turn to the left into Canada boulevard, keeping to the right of the buttons in the center of the street. Plaintiff Engle, the operator of the motorcycle, testified that he saw the automobile coming out of the driveway at a slow rate of speed, and that it proceeded very slowly until it was about 4 feet ahead and to the right of his motorcycle, when the automobile made a sudden spurt forward and collided with the motorcycle, causing the injuries complained of, as a result of which each of the plaintiffs suffered the loss of his right foot, and each of the plaintiffs was discharged from the navy because of such loss.

Appellant Henning testified that he saw the motorcycle when it was about 450 feet south of him on Verdugo road; that, as he pulled out of the service station, he took his eyes from the left and watched the right; that he saw the motorcycle again before the collision and that it was probably 30 feet away when he saw it again; and at that time his machine was somewhere near the middle of the street; that he then stepped on the brake and clutch and did not at any time "step on the gas"; that he did not accelerate his speed when he saw the plaintiffs the second time, and as soon as he saw them he stepped on the clutch and brake; that, when he saw the motorcycle the second time, it was coming toward him at a speed of at least 50 miles per hour and was traveling in a wide curve to the left, leaning to the left-hand side.

It will be seen from this résumé of facts that there was a direct conflict in the evidence as to the speed of the motorcycle and also a direct conflict as to whether or not the speed of the automobile was increased by a sudden spurt forward immediately before the collision.

Upon this appeal, appellants contend that plaintiff Engle, the operator of the motorcycle, was guilty of contributory negligence as a matter of law, and that the trial court committed prejudicial error in its instructions to the jury, also that the trial court erred in submitting the case to the jury on the last clear chance doctrine, since that doctrine is not applicable to the case.

[1-4] In connection with point I, appellants contend that the plaintiff Engle was guilty of contributory negligence as a matter of law—

"(a) In that he operated a motorcycle not equipped with a horn or other warning device, it appearing that if he had had a horn he could have warned the defendant Henning of the approach of the motorcycle in ample time to have averted the collision; and,

"(b) Independently of the absence of a horn, in that with full knowledge of the entire situation, with his eyes wide open, and with ample time and opportunity to avert the collision, he not only proceeded forward with unabated speed, but when 10 or 15 feet from the point of collision he without cause or necessity turned closer to the approaching automobile and thereby made the collision inevitable."

This was plainly a matter for the jury, as there was evidence that respondent Engle saw appellant's automobile coming out of the private driveway at a slow rate of speed, which indicated to him that appellant was conceding him the right of way, in accordance with section 132 of the California Vehicle Act (St.1923, p. 560, as amended by St.1929, p. 542). Furthermore, the record shows that, when the motorcycle was in motion, it caused a noise like a series of explosions, that such noise was from the exhaust, and, at the time when the automobile of defendants was entering Canada boulevard, the motorcycle was traveling 35 miles per hour and made enough noise so that it could be heard plainly for a distance of from 400 to 500 feet.

It is settled law that a party approaching a highway from a private driveway must sound his horn and thus give warning of his intention to come into the street without conceding the right of way to approaching traffic (Uhl v. Fertig, 56 Cal.App. 718, 206 P. 467); and, in the circumstances here presented, respondents had the right to as-

sume that appellant Henning would not suddenly increase his speed in crossing the highway in the path of respondents' motorcycle, and would not take the right of way in the absence of warning of his intention so to do. As to respondent Engle, there was evidence, although disputed by other evidence, that he was proceeding lawfully upon the highway, and therefore, if this was true, he was under obligation to sound a horn only in the event it appeared necessary to give a warning. It was for the jury to determine from the evidence whether respondent's failure to sound a horn, under all the circumstances as found by it from such evidence, did or did not constitute contributory negligence on his part.

As to appellants' point 2, that the trial court committed prejudicial error in giving instructions numbered 41, 56, 23, 24, 25, and 51, which were requested by the respondents, we have read these instructions together with the other instructions given to the jury, and are of the opinion that the jury was fully and fairly instructed on the various angles of the case, and that, if there was any slight error in any of the instructions as given, it was not prejudicial to the appellants.

[5] In addition, appellants assert that a portion of instruction numbered 41 submitted the case to the jury on the doctrine of the last clear chance, and that, entirely independent of any intrinsic defects in the instruction itself, it was prejudicial error to give an instruction on that doctrine, which was inapplicable to the facts in the case.

The criticized portion of the instruction is as follows: "And if you should find that Mr. Engle realized, or that an ordinarily prudent person under the same or similar circumstances would have realized, that the driver of the said Buick automobile was not going to stop and that he could have stopped his motorcycle and avoided the accident had he tried to do so, still you must find for the plaintiffs if you should find that the driver of said Buick automobile was guilty of some new and independent act of negligence which intervened between the failure of Mr. Engle to stop and the accident, and that said new and intervening act of negligence was the sole and proximate cause of the accident."

No instruction fully setting forth the doctrine of the last clear chance was asked by appellants, but this criticized instruction apparently was asked by respondents on the assumption that a full instruction on such doctrine would be asked by appellants. The criticized portion of the instruction really gives the jury the law as to when it may disregard the ordinary rule of law contained in the so-called doctrine of the last clear chance. The legal effect of the instruction as it reads is merely that, where the jury finds that some new and independent act of negligence on the part of the defendants was the sole and proximate cause of the accident, and that the accident would not have occurred except for such new and independent act of negligence, then the doctrine of the last clear chance cannot be invoked by the person or persons whose negligence was the sole and proximate cause of the accident. It was impossible for the court to tell which portion of the evidence would be believed by the jury, whether that introduced by the defendants or that which was introduced by the plaintiffs. We believe that any possible harm to the defendants by the giving of the instruction is eliminated by the latter portion of the instruction, which, in effect, makes the whole instruction inapplicable, unless the jury found that a new and intervening act of negligence on the part of the driver of the automobile was the sole and proximate cause of the accident.

[6] This is a case in which there is a direct and positive conflict in the evidence introduced. We must assume, therefore, that the jury in rendering its verdict in favor of both of the plaintiffs had in mind all of the evidence introduced on the trial of the action, and must have believed that there was a sudden burst of speed immediately prior to the accident on the part of the automobile driven by appellant Henning, and that the jury concluded such increased speed constituted negligence on the part of said appellant and was the sole and proximate cause of the accident. Otherwise, under the instructions given by the court, the jury would have brought in a verdict in favor of plaintiff Nix only, the passenger on the motorcycle, but against plaintiff Engle, the operator thereof.

The judgments are affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.

11 Cal.App.2d 424

PEOPLE v. TOMLINSON et al.

Cr. No. 2807.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1936.

Robbery ⇐24(1)

Evidence *held* to sustain conviction for robbery in second degree.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Archie L. Tomlinson and Clinton Albert Davis were convicted of robbery in the second degree, and they appeal.

Affirmed.

Floyd H. Bowers, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendants were convicted by a jury of robbery in the second degree. It appears from the evidence that the victim met the two appellants in a café one evening and, after a few rounds of drinks there and elsewhere, while walking down San Pedro street the three of them went into an alley. One of the appellants threw his arm around the victim's neck and the other assaulted him; at this point he was relieved of his wallet containing $40 in cash. The victim then succeeded in getting his knife open and wounded each of the appellants, who ran out of the alley with the victim in pursuit. The victim immediately notified the police. Appellant Tomlinson first went to his own hotel, borrowed a pair of trousers from a friend to replace his own, which were saturated with blood, then went to another hotel where he obtained a room, at which place he was arrested the next morning.

The other defendant fled in another direction and having been stabbed in the lung, collapsed and was taken to the receiving hospital.

When appellants were confronted with Mr. Donelley, the victim, they denied that they knew him or had ever seen him before. At the trial, however, they told the characteristic story of a fight over a loan. When they were arrested they each gave different accounts of how their wounds had been received. When appellant Davis was arrested he had on his person two $10 bills, two $5 bills and one $1 bill, which were of the same denomination and amounts that Donelley, the victim, claimed to have lost in the robbery.

The foregoing is not all, but a substantial part of the evidence produced against the defendants at the trial. Appellants set forth six alleged errors of law consisting of rulings on objections and motions to strike and the admission of testimony. They are all too trivial to be worthy of consideration, and are devoid of merit.

The refusal of the court to give the instructions requested by appellants was not in error.

Finally, the claim that the verdict is contrary to the evidence can be summed up in the answer that any other verdict would have been a miscarriage of justice.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: HOUSER, P. J.; YORK,



11 Cal.App.2d 400

FERSLEW v. ANDERSEN.

Civ. 10780.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1936.

Appeal and error ⇐766

Where appellant failed to comply with rule requiring that question involved on appeal be stated on first page of opening brief without any other matter appearing thereon, appeal would be dismissed (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2, p. 10).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Max Ferslew against Antone Andersen. From a judgment for defendant, plaintiff appeals.

Appeal dismissed.

W. J. Galbraith, of Addington, Okl., for appellant.

Butcher & Haines, of Santa Barbara, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after a trial before a court without a jury.

Appellant has not observed the provision of rule VIII, section 2, of this court, which requires that the question involved on appeal in a civil action be set forth on the first page of the opening brief without any other matter appearing thereon. Rule VIII, § 2, p. 10, Rules of the Supreme Court and District Courts of Appeal of the State of California.

In the instant case there is a total absence of a compliance with the foregoing rule. This court cannot assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, supra, in its entirety.

For the foregoing reasons, the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 232

PEOPLE v. FISHER.

Cr. 2817.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1936.

Hearing Denied by Supreme Court Feb. 13, 1936.

1. False pretenses ⇐49(2)

Where it was alleged that defendant intended to defraud bank upon which he drew checks without sufficient funds or cashier of title company with whom he dealt, evidence indicating that neither bank nor cashier suffered any loss, which was assumed by title company, *held* not to preclude conviction as overcoming substantial evidence of defendant's intention to defraud cashier and bank (Pen.Code, § 476a).

2. Criminal law ⇐807(1), 829(1), 830

Refusal to give requested instructions *held* not reversible error, where refused instructions were either covered elsewhere, were argumentative, or actually erroneous.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Harold Fisher was convicted of issuing checks without sufficient funds with intent to defraud, and he appeals.

Affirmed.

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was convicted of the crime of issuing checks without sufficient funds, having the intent to defraud under section 476a of the Penal Code. The allegation of the information was that the defendant with intent to cheat and defraud Dan O'Neill and Security-First National Bank drew the check upon the Security-First National Bank. The appeal is from a judgment of conviction and from the order denying a new trial.

[1] The first and primary contention of the defendant is that there is an entire absence of any evidence of intent to defraud O'Neill or the bank as alleged in the information. In this behalf the defendant contends that the evidence shows that O'Neill was a cashier with the Title Insurance & Trust Company; that the dealings of the defendant with O'Neill were in O'Neill's capacity as cashier; and that if the defendant had any intention to defraud any person or corporation, it was the title company, and that the moneys obtained were the moneys of the title company. Under the circumstances in evidence any one of the three might have suffered the loss. The mere fact that there was evidence to indicate that the bank and O'Neill suffered no loss and that the title company assumed the loss does not wash out the substantial evidence of the defendant's intention to take advantage of and to defraud O'Neill and the bank.

[2] The defendant next complains of the refusal of the court to give several instructions requested by him. We find upon examination of the record, however, that the court committed no reversible error in refusing to give the defendant's instructions. The instructions which were refused were either fully covered elsewhere or they were

argumentative and likely to confuse the jury as to the real issue of intent, or were actually erroneous. Defendant's contentions with regard to the instructions have been heretofore determined over and over again by this court and it would serve no useful purpose to discuss them in detail again.

Finally, the defendant contends that the court erred in its rulings as to the admission or rejection of evidence. We have examined all of these rulings and find that no prejudicial error was committed by the trial court.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



11 Cal.App.2d 266

MINEHAN et al. v. SILVERIA et al.

Civ. 9637.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1936.

Judgment ⇐700

Judgment obtained in suit against partnership and individual partners upon partnership obligation after trial on merits for less than amount claimed which was paid *held* res judicata of liability of partnership firm as such in subsequent suit for full amount of claim (Code Civ.Proc. § 388; Civ. Code, § 2409, subd. (b).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by T. P. Minehan and others, copartners doing business under the firm name and style of T. P. Minehan & Sons, against I. V. Silveria and another and Silveria & Serpa, a copartnership. Judgment for defendants, and plaintiffs appeal.

Affirmed.

See, also, 3 Cal.App.(2d) 550, 40 P.(2d) 285.

Carl R. Schulz, of San Francisco, for appellants.

John J. Jones, of San Jose, for respondents.

PER CURIAM.

The complaint in this action was against Silveria & Serpa, a copartnership, and defendants Silveria and Serpa, the partners constituting the firm, to recover a firm debt alleged to be in the sum of $1,993.45. All the defendants, including the firm as an entity, joined in a general demurrer, which was overruled. An answer was then filed by the individuals mentioned, denying the allegations of the complaint except that they admitted a firm indebtedness of $343.55. No answer was then filed by the firm as such. The case went to trial on the above pleadings and resulted in a judgment for plaintiffs in the amount last named without costs, and they appealed therefrom. The District Court of Appeal considered the judgment to be one against the individual partners only, and as such it was affirmed except the portion denying costs, which was modified to award costs to plaintiffs. Minehan v. Silveria, 131 Cal.App. 317, 21 P.(2d) 617. The cause was again brought on for trial; it being plaintiffs' contention that, the original judgment being against the members of the firm only, they were entitled to proceed against the firm as an entity and recover the full amount of their claim notwithstanding the previous judgment, which admittedly was paid and satisfied. The partners mentioned defended on their own behalf and on behalf of the partnership as an entity, alleging as a defense that the above facts and the previous judgment were a bar to the maintenance of the action against the firm as such. The trial court found in accordance with these defenses and entered judgment against the plaintiffs, who have appealed therefrom.

For the purpose of obtaining jurisdiction a partnership or association will be treated as an entity (Code Civ.Proc. § 388), and a judgment may be entered accordingly; but, where the partners are joined in a suit upon a partnership obligation, for which obligation they are jointly liable (Civ. Code, § 2409, subd. (b), and the matter is litigated upon the merits, resulting in a judgment for less than the amount claimed in the complaint, as was the case here, such a judgment, if paid and satisfied, should in justice bar further proceedings against the firm as such. And this result appears to be sustained in principle by the authorities. Bank of Orland v. Stanton, 135 Cal. 593, 67 P. 1035; Brad-

ley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171; Triano v. F. E. Booth & Co., 120 Cal.App. 345, 8 P.(2d) 174; Duell, Inc., v. Metro-Goldwyn-Mayer Corporation, 128 Cal.App. 376, 17 P.(2d) 781; Butler v. Ashworth, 110 Cal. 614, 43 P. 4, 386; Melander v. Western Nat. Bank, 21 Cal.App. 462, 476, 132 P. 265; Bancroft, Code Practice and Remedies, § 1896; Freeman on Judgments, §§ 571, 589.

The judgment is affirmed.



11 Cal.App.2d 202

SHAPIRO v. INGERSOLL et al.

Civ. 10634.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1936.

1. Automobiles ⇐245(38, 50)

In action for injuries sustained in collision of motortrucks caused by steering apparatus of defendants' truck breaking, cause of accident, existence of latent defects, and sufficiency of defendants' inspection *held* for jury.

2. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by S. L. Shapiro against Don D. Ingersoll and another. From a judgment for defendants and an order denying plaintiff's motion for a new trial, plaintiff appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

E. B. Drake, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

WOOD, Justice.

Judgment was entered in favor of defendants after the return of a verdict in their favor, and plaintiff appeals from the judgment and from the order denying his motion for a new trial. Defendant Ingersoll was driving an oil truck owned by defendant Shell Oil Company south along Ramona boulevard near its intersection with Townsend street. Plaintiff was driving a truck north on Ramona boulevard. In the vicinity of the accident, Ramona boulevard is neither level nor straight. The truck of defendants, in proceeding south, was on a downhill grade, the degree not being shown by the evidence, and Ramona boulevard swerves so that defendants' truck would in its regular course turn slightly to the right in traveling south. At some distance from the point of collision the steering apparatus of defendants' truck broke and Ingersoll was unable to control its direction. As a result the truck did not turn with the street, but proceeded in an approximately straight line across the boulevard and collided with plaintiff's truck. In their answer defendants denied negligence, asserted that the collision was the result of an unavoidable accident, and alleged contributory negligence on the part of plaintiff.

[1] Plaintiff's main contention is that the court erred in instructing the jury on the subject of latent defects. The court instructed the jury that it was claimed by defendants that the steering apparatus of the truck was in bad condition on account of what is commonly known as a latent defect, and that a latent defect is one such as is not ordinarily discoverable by the use of ordinary care in and about the instrumentality in question. The court further instructed the jury that defendants owed to the plaintiff and to the public only the duty of exercising ordinary care in the examination and inspection of their automobile equipment. Plaintiff does not contend that the instructions did not correctly state the law, but argues that the evidence was not such as to permit the giving of instructions on the subject. Evidence was introduced as to the method followed by defendants in the inspection of the truck and an expert witness was called who testified that in his opinion "what produced or caused the break from a chemical standpoint was due to chemical substances present in the steel originally, the original casting, that is, at the time it was cast in the foundry. * * * I think it was probably due to phosphorous. Phosphorous is

a foreign element that acts in a very deleterious manner on steel." Plaintiff contends that since it was shown that the inspector did not disassemble the part of the truck which contained the broken piece, the court should not have given the jury the instruction on latent defects, and that the evidence shows without question that proper inspection was not made. The evidence was sufficient to submit the issue to the jury. The issues of the cause of the accident, the existence of a latent defect, and the sufficiency of the inspection were questions to be determined by the jury. These questions were resolved by the jury in defendants' favor, and the verdict being supported by sufficient evidence, the implied findings of the jury may not now be disturbed.

Plaintiff further contends that the evidence showed that defendant Ingersoll did not properly control the car, and was proceeding down Ramona boulevard at an excessive rate of speed. The implied findings of the jury were adverse to plaintiff on these points, and the record discloses ample evidence to sustain the verdict.

[2] The judgment is affirmed. The order denying the motion for a new trial is not one from which an appeal may be taken, and the appeal therefrom is dismissed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



11 Cal.App.2d 375

MORRIS et al. v. WHITTIER AMUSEMENT CO. et al.

Civ. 10784.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1936.

1. Appeal and error ⇐1099(3)

Decision on former appeal that, where parties associated themselves together to acquire property and afterwards form corporation, secret profit secured by party purchasing property belonged to organizers and not corporation, became law of case, precluding contention on subsequent appeal that forfeited stock of party making secret profit belonged to corporation.

2. Appeal and error ⇐882(3)

Where defendant stockholders of corporation which was sued by other stockholders to recover forfeited stock disclaimed in trial court any interest in forfeited stock, such defendants could not contend on appeal that they had an interest in all of corporation's property which would be unduly diminished by judgment for plaintiffs.

3. Appeal and error ⇐878(6)

Plaintiffs failing to appeal from unsatisfactory judgment awarding them interest in forfeited corporate stock were not entitled on defendants' appeal to request modification of judgment to give them larger proportion.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by R. R. Morris and another against the Whittier Amusement Company and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

McAdoo & Neblett, of Los Angeles, for appellants.

R. T. Walters, of Whittier, for respondents.

WOOD, Justice.

Plaintiffs and the individual defendants, other than defendants Berry, Siler, and Gwin, who will hereinafter be referred to as the "associates," became associated together for the purpose of purchasing a theater building in the city of Whittier owned by defendants Berry. Defendants Siler and Gwin were the owners of the equipment of the theater. The associates designated one of their number, defendant Harris, to negotiate with Mr. and Mrs. Berry, the owners of the building, for the purchase of the property; it being understood that Harris was not to receive any profit for his services in the matter. Harris informed the other associates that the property could be bought for the sum of $75,000, subject to a mortgage of $60,000, and it was agreed that the property should be purchased by the associates from Mr. and Mrs. Berry at this price. An agreement was made between the associates and Siler and Gwin whereby it was agreed that a corporation would be formed in which defendants Siler and Gwin would

have an interest in the sum of $45,000, the price agreed upon as the value of the equipment owned by them. Thereafter a corporation was formed, Whittier Amusement Company, and the stock was issued to the associates in proportion to the amount each had subscribed for the purchase of the building. Stock was also issued to Siler and Gwin in proportion to the value of the equipment of the theater.

In order to carry out the transaction, Mr. and Mrs. Berry transferred title to the real estate to Siler and Gwin as trustees, and they in turn transferred the title to the building and equipment to the corporation. After the respective shares in the corporation had been issued to the various parties concerned, it was discovered that defendant Harris had received a secret profit in his negotiations with Mr. and Mrs. Berry for the purchase of the building; that a dummy promissory note in the sum of $10,000 had been delivered to Harris by Mr. and Mrs. Berry, and that this note had been turned in as cash at its face value; that in truth the total purchase price of the building was only $125,000, represented by $65,000 cash and the mortgage of $60,000. Thereupon the corporation demanded of Harris that his stock be surrendered, Harris delivered the stock to the corporation, and it is now held by the corporation.

Plaintiffs contend that the corporation is not the owner of the Harris stock and that it belongs to the associates in proportion to the amount of cash paid by each of them for the building. This contention was upheld by the trial court, and judgment was entered accordingly. From the judgment an appeal is taken by the defendant corporation, defendants Siler and Gwin, and by the various associates of the plaintiff, who were made party defendants.

[1] It is first contended by all defendants that the Harris stock is the property of the corporation. This contention of defendants has been passed upon by the District Court of Appeal upon an appeal previously taken by plaintiffs from an order of the trial court sustaining a demurrer without leave to amend and from a judgment in favor of the defendants entered thereon. In the former appeal, based upon allegations of facts in the complaint substantially the same as those herein set forth, it was held that the corporation had no interest in the Harris stock. In the opinion filed in that case, Morris v. Whittier Amusement Co., 123 Cal.App. 121, 10 P.(2d) 1017, the court said: "The complaint alleges * * * that defendant Harris was selected by said intended purchasers as their representative and agent to secure from defendants Berry their lowest purchase price for said property and to negotiate the sale thereof to all of said parties, including plaintiffs and Harris, and a corporation to be thereafter organized by them * * * that title to said property was taken in the names of Siler and Gwin, who were to hold the same and deed it to a corporation to be formed by said parties; that said corporation, Whittier Amusement Company, was formed, and the property deeded to it. * * * It would appear that the transaction here detailed was a matter entirely between themselves [associates]. * * * We cannot see how the corporation is the aggrieved party. The alleged fraudulent sale was not made to it, but to the associates, at a time when the corporation was not in existence. * * * We believe that this sum belongs equitably to those who advanced and paid it, and that plaintiffs are entitled to recover their pro rata share thereof." It is apparent that the decision on the former appeal has become the law of the case and that the defendants may not now contend that the Harris stock is the property of the corporation.

[2] It is the next contention of the defendants that defendants Siler and Gwin have an interest in all of the property of the corporation and that their interest in the affairs of the corporation would be unduly diminished by the judgment of the trial court in awarding plaintiffs 20/75 of the Harris stock. This contention cannot be upheld. Siler and Gwin joined the corporation and the other defendants in an answer in which they disclaimed any interest in the stock. Paragraph V of the answer is as follows: "Deny that the defendants other than the Whittier Amusement Company have any right, title or interest in and to said one hundred (100) shares of Whittier Amusement Company stock, and these answering defendants other than the Whittier Amusement Company hereby disclaim any right, title or interest in and to said stock."

Complaint is made of several rulings of the trial court sustaining objections to questions concerning the intentions of the parties and their plans in regard to the

organization of a corporation. Some of these questions might well have been answered. No offer of proof was made following the rulings of the court. Moreover, we cannot see how the ultimate decision could be affected or the rights of the defendants prejudiced by the rulings of which complaint is made.

[3] Plaintiffs now contend that they should receive a larger proportion than 20/75 of the Harris stock, for the reason that part of the $75,000 cash payment was made up of the fictitious Harris note in the sum of $10,000, and that in reality only $65,000 cash was paid for the building. Plaintiffs did not appeal from the judgment of the trial court awarding them 20/75 of the Harris stock. They may not now ask the court to modify the judgment by giving them a larger proportion. Larkin v. Mullen, 128 Cal. 449, 60 P. 1091.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



11 Cal.App.2d 191

SMALL v. CHARLES R. ROGERS PRODUCTIONS, Inc., et al.

Civ. 9868.

District Court of Appeal, Second District, Division 1, California.

Jan. 10, 1936.

1. Mortgages ⇐282(2)

If agreement whereby promisor assumed debt secured by trust deed and agreed to hold mortgagor harmless therefrom was one of indemnity merely, all liability was discharged when property was purchased at trustee's sale; debt being thereby extinguished.

2. Mortgages ⇐283(1)

Contract whereby obligor agrees to pay existing mortgage and to hold mortgagor harmless as part of consideration upon purchase of realty renders obligor liable as principal to mortgagee, and invests mortgagor with right to reimbursement in case he is obliged to pay all or part of mortgage debt.

3. Mortgages ⇐283(1)

One who assumes mortgage indebtedness assumes mortgagor's obligations as principal debtor.

4. Mortgages ⇐282(1)

Under contract whereby, upon mortgagor's sale of realty, person assumed payment of mortgagor's debt secured by trust deed on realty, promisor *held* not liable for mortgagor's alleged loss by reason of mortgagee's foreclosure of security which mortgagor otherwise would have had for unpaid balance of purchase price; promisor's liability being that of an indemnitor.

5. Mortgages ⇐282(2)

One who by contract merely assumes existing mortgage or trust deed indebtedness as part of consideration for purchase of land held as security therefor becomes as to mortgagee or beneficiary principal debtor, and, as to mortgagor, an indemnitor only.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Edward Small against Charles R. Rogers Productions, Inc., and Charles R. Rogers. From a judgment for second named defendant after sustaining second named defendant's demurrer to amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Zagon & Aaron, of Los Angeles, for appellant.

Carpenter, Babson & Fendler, of Los Angeles (Ingle Carpenter and Harold A. Fendler, both of Los Angeles, of counsel), for respondent.

SHINN, Justice pro tem.

This is an action for damages based upon the alleged breach of an agreement to pay a debt secured by a trust deed of real property. The demurrer of defendant Charles R. Rogers to the amended complaint, upon general and special grounds, was sustained without leave to amend. From the resulting judgment in favor of said defendant, plaintiff appeals.

Charles R. Rogers Productions, Inc., a corporation, herein referred to as the "corporation," agreed to purchase certain real property from Majestic Realty Corporation, herein referred to as "Majestic," for the sum of $120,000, payable $15,000 in cash, upon the execution of the contract, $30,000 in stated installments, and the balance by the

assumption of a debt of Majestic in the amount of $75,000, secured by trust deed of the property. Defendant Charles R. Rogers, by the terms of the agreement of purchase, assumed certain obligations which give rise to the plaintiff's claim to damages. The provisions of the contract here involved read as follows: "The corporation and Rogers jointly and severally agree that they will and they do hereby assume the payment of the present outstanding and existing encumbrance on said property, which is a mortgage in the amount of $75,000, together with all interest due thereon from April 20, 1931, which is a first lien on said real property, which said mortgage secures a note held by and/or payable to the LaBrea Securities Company of Los Angeles, California, and they do hereby agree to indemnify and save free and harmless of all liability, loss and/or damage the Majestic and the present stockholders in connection with the said note and/or mortgage securing same, and the said corporation and Rogers do hereby jointly and severally agree that they will and they do hereby assume the payment of all taxes and/or assessments levied upon the said real property from April 20, 1931." By the terms of the agreement, Majestic had the option, upon default of the purchaser, to declare all unpaid sums immediately due and payable or to terminate the contract and retain the sums paid thereon as liquidated damages. Default was made, and the seller elected to declare due the unpaid balance of the purchase price, amounting to the sum of $26,250, no part of which has been paid to plaintiff. This debt is alleged to be uncollectible, because of the insolvency of the corporation. No part of the trust deed indebtedness was paid save the sum of $7,000. The trust deed was foreclosed, the property was sold for the full amount of the indebtedness remaining unpaid, and the security of the seller, consisting of a vendor's lien for the unpaid balance of the purchase price, was thereby lost. This action is brought upon the theory that, had the corporation and Rogers paid the trust deed indebtedness, the seller would have held a vendor's lien upon the property, otherwise free of encumbrance, as security for the balance of the purchase price. The value of the real property is alleged to exceed this unpaid balance, and therefore it is alleged that Majestic has been damaged in the sum of $26,250 and interest. Plaintiff Small is the owner of one-third of the capital stock of Majestic. By the terms of the contract, the progress payments were to be made directly to the stockholders; plaintiff being entitled to one-third thereof. For the purposes of this decision only it will be assumed that plaintiff has authority to maintain this action for the recovery of any damages he may have sustained by reason of the facts alleged.

[1] We shall discuss the questions raised by the general demurrer of the defendant Rogers. In order to sustain the claims of plaintiff, the agreement, so far as defendant Rogers is concerned, would have to be construed as something more than an agreement to indemnify Majestic against liability on account of the trust deed indebtedness. If the agreement is one of indemnity merely, all liability was discharged when the property was purchased at the trustee's sale; the debt being thereby extinguished. It is not questioned by defendant Rogers that his assumption of the debt secured by the trust deed and his agreement to hold Majestic harmless therefrom bound him to pay the amount of any deficiency which might remain upon a sale of the property under a foreclosure of the trust deed, but he maintains that he assumed no greater obligation than this. Under the plaintiff's construction of the contract, defendant is sought to be held to a liability for plaintiff's alleged loss, by reason of the foreclosure, of the security which it otherwise would have had for the unpaid balance of the purchase price, thus imposing upon the defendant the obligation, not only to pay any deficiency remaining after a foreclosure, but, in addition thereto, any balance of the purchase price which the purchaser failed to pay. Upon a construction of the entire contract we are unable to give it this broad effect.

[2-4] The liability of one who assumes and agrees to pay an existing mortgage or trust deed encumbrance, and to hold the maker thereof harmless therefrom, as a part of the consideration paid upon the purchase of real property, has been frequently declared by the courts. The law is well settled that such a contract renders the obligor liable, as principal, to the holder of the encumbrance, and as between himself and the mortgagor invests the latter with the right to reimbursement in case he is obliged to pay all or part of the mortgage debt. Consequently, the obligation assumed is to pay to the mortgagee the amount of any deficiency remaining after foreclosure and sale of the security, and thus to indemnify the mortgagor against liability therefor.

Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609; Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Tompkins v. Powers, 106 Cal.App. 464, 289 P. 685; Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818; Sherwood v. Lowell, 34 Cal.App. 365, 167 P. 554; Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278. The principle upon which these and other supporting cases rest is that one who assumes a mortgage indebtedness steps into the shoes of the mortgagor; thereby assuming the obligations of the latter as a principal debtor. His contract, like the contract to assume any debt of another, is to merely assume the existing obligation and to carry out the contract of the mortgagor. When this has been done, the obligation assumed, and consequently the agreement by which it was assumed, have been performed. The assumption of mortgage indebtedness in the purchase of property, especially real property, is a practice so extensively followed that the obligations thereby assumed may be said to be a matter of common knowledge. That it carries with it a liability greater than that so frequently declared by the courts and generally recognized in the business world can be true only in a case where the contract of the parties clearly imposes such additional liability. A contrary rule might easily lead to unexpected consequences. No exceptional case is presented by the facts alleged in the complaint. Defendant Rogers was not one of the purchasers of the property. He did not agree to pay the purchase price nor did he guarantee its payment by the corporation. He very clearly intended to limit his liability to a contract of indemnity; otherwise he would have assumed the obligations of a purchaser. This appears not only from the fact that the corporation was the sole purchaser but from a provision of the contract respecting the rights of the seller in case of default. The contract, after setting forth the right of the seller to retain all moneys paid on the contract and to cancel the escrow through which a conveyance was to be made, provided as follows: "It is further understood and agreed that Majestic may in lieu of terminating said escrow and receiving said deed and retaining said money, at its option, declare the entire balance due on account of said purchase price immediately due and payable and may sue and recover from the corporation such amount then due, together with interest from the date thereof at the rate of 7% per annum, together with attorneys' fees." This provision but confirms the patent fact that the parties intended by the use of the customary language employed that Rogers would assume as to Majestic only the customary liability; namely, that of an indemnitor. The contract is devoid of any expression suggesting a different intention. It is not conceivable that, had the parties intended that Rogers should, in effect, become a guarantor of the payment of the purchase price of the property, in the event of a foreclosure of the trust deed, as well as an indemnitor of Majestic against liability thereon, they would have failed to express their agreement in clear and unequivocal language.

[5] Plaintiff relies upon cases from other jurisdictions in which, because of their peculiar facts, exceptions to the rule we have stated have been followed. Haas v. Dudley, 30 Or. 355, 48 P. 168, is authority for the rule stated in 41 C.J. 760, to the effect that, where the mortgagor of land, all under a single mortgage, sells a part of it and there is a specific agreement by the grantee to pay the entire mortgage as a part of the purchase price of the portion of the land he buys, and he fails to do so, and the land retained by the mortgagor is lost by foreclosure, the mortgagor may recover against his grantee in an action for damages on the assumption agreement, and the measure of damages is the value of the land lost. The inapplicability of this authority to the facts of the instant case is quite clear. The court, we think, very properly held in the cited case that the parties had in mind, and contracted with reference to, an obligation which was something more than a mere agreement to indemnify the mortgagor against a deficiency; namely, protection against the loss of the portion of the land included in the mortgage but not included in the sale. Another case cited by plaintiff is Rice v. Sanders, 152 Mass. 108, 24 N.E. 1079, 8 L.R.A. 315, 23 Am.St.Rep. 804, which was a case where land subject to two mortgages was sold to a purchaser, who assumed and agreed to pay both mortgages as a part of the purchase price. After foreclosure of the first mortgage and sale of the land, leaving the mortgagor personally liable upon the second mortgage, security for which had been lost, it was held that the purchaser was liable in damages in the amount of the second mortgage. This case is not to be distinguished in principle from one in which the mortgagor has become entitled to call on his indemnitor to pay a deficiency judgment. These cases are but il-

lustrations of contracts which the courts have construed as being something more than agreements of indemnity. They constitute exceptions to the general rule because of their exceptional facts. Not only has plaintiff failed to cite to us any precedent for the redress he seeks, but his position is opposed to the established law in this jurisdiction, namely, that one who by contract does nothing more than assume an existing mortgage or trust deed indebtedness, as a part of the consideration for the purchase of land held as security therefor, becomes, as to the mortgagee or beneficiary, a principal debtor, and as to the mortgagor, an indemnitor only.

The demurrer was properly sustained without leave to amend.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



11 Cal.App.2d 752

E. M. ASHER, Plaintiff and Appellant, v. CHARLES R. ROGERS PRODUCTIONS, Inc. (a Corporation) and Charles R. Rogers, Defendants, and Charles R. Rogers, Respondent.

Civ. 9858.

District Court of Appeal, Second District, Division 1, California.

Jan. 10, 1936.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Zagon & Aaron, of Los Angels, for appellant.

Carpenter, Babson & Fendler, of Los Angeles (Ingle Carpenter and Harold A. Fendler, both of Los Angeles, of counsel), for respondent.

SHINN, Justice pro tem.

Appeal from a judgment in favor of defendant Charles R. Rogers, after an order sustaining a dmurrer to a complaint without leave to amend in an action for damages for the alleged breach of an agreement to pay an indebtedness secured by a trust deed.

The facts of this case are the same as those in the case of Small v. Charles R. Rogers Production, Inc., et al. (Cal.App.) 53 P.(2d) 774, this day decided; plaintiff herein suing upon an identical cause of action. The same points are urged in the present case as were decided in the Small Case, and, upon the authority of that case, the judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.



11 Cal.App.2d 258

BRUSH v. KURSTIN et al.

Civ. 10630.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1936.

1. Appeal and error ⇐1001(1)
Negligence ⇐136(26)

Plaintiff's contributory negligence is question of fact for jury, whose finding will not be disturbed by reviewing court where there is substantial evidence to support it.

2. Automobiles ⇐244(50)

Evidence sustained implied finding that pedestrian, struck at intersection by automobile approaching from her right which she had been observing while crossing street, was not contributorily negligent.

3. Trial ⇐296(8)

In personal injury action by pedestrian struck by automobile, instruction in part that preponderance of evidence meant evidence which produced conviction rather than that which was not convincing *held* not reversible error in view of other instructions, although incorrect.

4. Automobiles ⇐246(4)

Instruction that right of automobile drivers to use public highways is not superior to that of any pedestrian and that all persons using highway must use constant care to conserve rights of each of parties *held* not error.

5. Automobiles ⇐246(4)

Instruction that driver of automobile had no right to assume that highway was clear, was bound to anticipate presence of pedestrians and was negligent if he failed to

exercise ordinary care for protection of such pedestrians *held* not error.

6. New trial ⇐9

Where trial court believes that amount of damages awarded is not adequate, it may grant new trial on ground that evidence does not justify verdict and limit issue solely to that of ascertaining amount of damages sustained (Code Civ.Proc. § 657).

7. New trial ⇐9

Trial court *held* authorized to grant plaintiff new trial on issue of damages alone in action based on statutory liability of automobile owner for injuries resulting from negligent operation of automobile, since owner's liability was independent of judgment against operator of automobile (Civ.Code, § 1714¼; Code Civ.Proc. § 657).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Irene Brush against Morris A. Kurstin, Bernice Kurstin, and others. Judgment for plaintiff, and defendant Morris A. Kurstin appeals, and defendant Bernice Kurstin appeals from an order granting plaintiff a new trial on issue of damages alone.

Judgment and order affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Charles E. R. Fulcher, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by:

A. Defendant Morris A. Kurstin from a judgment in favor of plaintiff for damages in the sum of $4,697.50 after a trial before a jury;

B. Defendant Bernice Kurstin from an order granting plaintiff a new trial on the issue of damages solely.

Viewing the evidence most favorable to plaintiff (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Plaintiff at approximately 10:15 p. m., December 17, 1934, approached the southwest corner of Wilshire and Rampart boulevards in the city of Los Angeles. Looking west on Wilshire boulevard, she observed an automobile approaching her approximately a block away. At the same time she saw an automobile owned by defendant Bernice Kurstin, and being operated by defendant Morris A. Kurstin, traveling rapidly in a westerly direction on the same boulevard about 600 feet east of the intersection. The traffic signals were not in operation, but were flashing a yellow light. She then stepped into Wilshire boulevard, walking rapidly in the pedestrian crosswalk toward the northerly side of the thoroughfare. When in the center of the street, she looked and saw defendant's car traveling west on Wilshire boulevard near the northerly curb at a speed of about 40 miles per hour. Continuing to walk in a northerly direction for 5 or 6 feet, she again observed the defendant's car as it entered the intersection. Suddenly it swerved in a southwesterly direction and then again in a westerly direction, striking and seriously injuring the plaintiff while she was in the crosswalk approximately 6 feet north of the center line of the artery.

A. Defendant Morris A. Kurstin relies for reversal of the judgment on three propositions:

First. Plaintiff was guilty of contributory negligence as a matter of law.

Second. The trial court committed prejudicial error in instructing the jury as follows:

(a) "The term 'preponderance of the evidence' means the greater weight of the evidence. It does not necessarily mean the testimony of the greater number of witnesses on one side as opposed to a lesser number on the other. It means evidence which produces conviction in your minds, rather than that which is not convincing to you. The burden of producing a preponderance of the evidence rests upon the party having the affirmative of an issue, and in civil cases, such as this, all that is required is a preponderance of the evidence."

(b) "The right of drivers of automobiles to use public highways is not superior to that of any pedestrian, and in the exercise of a common right to the use of such public highways all persons using the same must exert constant care and caution for the conservation of the co-relative rights of each of the parties."

(c) "You are instructed that the defendant, Morris Kurstin, had no right to assume that the highway was clear, but under all circumstances and at all times he was bound to anticipate the presence of pedestrians lawfully upon the highways, and he was at all times and at all places required to use ordinary care and skill for the safety of

such pedestrians, and if you find that the defendant, Morris Kurstin, failed to exercise ordinary care and skill for the safety and protection of such pedestrians, then I instruct you that he was negligent in this particular."

Third. The trial court committed prejudicial error in (a) giving, (b) refusing, and (c) giving as modified various instructions.

[1,2] Defendant Morris Kurstin's first proposition is answered by an unbroken line of decisions in this state, holding contributory negligence on the part of plaintiff a question of fact for determination by the trial jury, whose finding will not be disturbed by this court, if there is substantial evidence in support thereof. Shields v. King, 207 Cal. 275, 277 P. 1043. An examination of the record in the instant case discloses a conflict in the testimony and substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the implied finding of the jury that plaintiff was not guilty of contributory negligence. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Koberle v. Hotchkiss (Cal.App.) 48 P.(2d) 104.

[3] The portion of the instruction set forth in paragraph (a) of defendant Morris Kurstin's second proposition reading, "It means evidence which produces conviction in your minds, rather than that which is not convincing to you," was inaccurate and academically incorrect beyond doubt. However, in view of the other instructions given by the trial court, this inaccurate statement did not constitute reversible error. Bowman v. Motor Transit Co., 208 Cal. 652, 284 P. 443; East Bay Municipal Utility District v. Kieffer, 99 Cal.App. 240, 257, 278 P. 476, 279 P. 178.

[4, 5] The instructions set forth in paragraphs (b) and (c) of appellant's second proposition are accurate statements of the principles of law embodied therein. Mr. Justice Lennon in Rush v. Lagomarsino, 196 Cal. 308, at page 317, 237 P. 1066, 1069, says:

"The right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian, and in the exercise of a common right to the use of the public highways, all persons using the same must exert constant care and caution for the conservation of their correlative rights, commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways. Accordingly, the driver of an automobile 'has no right to assume that the road is clear, but under *all circumstances* and *at all times* he must be vigilant and must anticipate and expect the presence of others. * * * Even though the operator of an automobile may be rigidly within the law, 'he still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop.' Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, 127.

"The instruction immediately under consideration in effect declared the law to be that 'it is not a part of the duty of an operator of a motor vehicle to keep his machine *always* under control, or that *it is his duty to keep it under control only a part of the time.* * * * Of course such is not the law." (Italics ours.) See, also, Meyers v. Bradford, 54 Cal.App. 157, 159, 201 P. 471.

Defendant Morris Kurstin finally contends that the trial court in numerous instances committed prejudicial error in either (a) giving, (b) refusing, or (c) giving as modified various instructions. A careful examination of the alleged errors fails to substantiate his contention.

B. Defendant Bernice Kurstin contends:

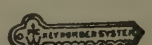
A new trial may not be granted as to the owner of an automobile sued under section 1714¼ of the Civil Code on the issue of damages solely.

[6, 7] This proposition is untenable. If the trial court is of the opinion that the amount of damages awarded is not legally adequate nor commensurate with the extent of injury received by the plaintiff, it may grant a new trial on the ground that the evidence does not justify the verdict (Koebig v. Southern Pacific Co., 108 Cal. 235, 237, 41 P. 469; Bennett v. Hobro, 72 Cal. 178, 13 P. 473), and in granting a new trial the court may limit the issue solely to that of ascertaining the amount of damage sustained (Tumelty v. Peerless Stages, 96 Cal.App. 530, 535, 274 P. 430; section 657, Code Civ.Proc.). This rule applies to a judgment entered against the owner of an automobile whose liability is based upon section 1714¼ of the Civil Code, since such

defendant's liability is direct and several, as well as joint, and is independent of a judgment against the operator of the vehicle. Milburn v. Foster (Cal.App.) 47 P. (2d) 1106; Guberman v. Weiner (Cal.App.) 51 P.(2d) 1141; Pascoe v. Payne, 124 Cal. App. 528, 12 P.(2d) 1091.

The judgment and order from which the appeals were taken are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 344

ADAMS v. WARREN.

Civ. 10272.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Appeal and error ⇐901

To complain of refusal of trial court to give requested instruction, party must establish that there was sufficient evidence to justify instruction and that instruction properly stated law.

2. Automobiles ⇐242(8)

In action for injuries received in automobile collision, defendant had burden to prove that plaintiff was contributorily negligent in driving in center lane (St.1931, p. 2125, § 123).

3. Trial ⇐252(8)

In action for injuries in automobile collision in center lane of highway, instruction that plaintiff was contributorily negligent as matter of law in driving in center lane of highway in violation of statute *held* properly refused in absence of proof that plaintiff was not entitled to drive in center lane under exception to statute requiring motorist to drive in right-hand lane (St.1931, p. 2125, § 123).

4. Appeal and error ⇐1004(1)

Question of excessive damages is one first addressed to trial court, and power of appellate courts over excessive damages exists only where facts are such as to suggest, at first blush, passion, prejudice, or corruption of jury.

5. Damages ⇐132(4)

$30,000 to osteopathic physician *held* not excessive for shattering of left elbow, pneumonia, collapse and loss of part of lung, complete loss of earnings of $500 per month for five months and partial loss of earnings thereafter, large amount expended for medical expenses, and personal property damage.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Loman C. Adams against Henry E. Warren. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harry D. Parker, Raymond G. Stanbury, White McGee, Jr., and Vernon W. Hunt, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

ROTH, Justice pro tem.

This action arises out of a collision between the automobiles driven by Loman C. Adams, plaintiff and respondent, and Henry E. Warren, defendant and appellant, respectively, on Telegraph road near the city of Los Angeles, in the nighttime on August 18, 1933. The case was tried before a jury, and a verdict for the sum of $30,000 was returned in respondent's favor. The evidence shows that respondent was operating his automobile in a westerly direction on Telegraph road approaching the east end of Rio Hondo river bridge at a speed of approximately 40 miles per hour. The highway over the bridge is marked for two lanes of travel. The highway to a point about 1,000 feet east of the easterly end of the bridge is divided into three lanes of travel. Beyond a point 1,000 feet easterly of the east end of the bridge, the highway, although wider, is only marked in two lanes of travel. Appellant, immediately prior to the collision, was operating his automobile in an easterly direction, had passed the bridge and after doing so attempted to pass an automobile in the center line, struck and knocked off the left front wheel of respondent's car, tore off the left door, the top, the left running board and the rear fender. Respondent, according to his testimony, at said time was traveling as follows:

"A. My car, the left front wheel was not to exceed a foot north of the northerly white line.

"Q. That would put your right wheels how close to the northerly side of the pavement? A. About 2 feet.

"Q. Did you continue to follow along the northerly side, in the northerly lane of traffic, until the accident occurred? A. Yes, sir."

Both parties at the time of the collision were alone. The headlights on each automobile were burning. Respondent was not at or prior to the accident overtaking any car or intending to make a left-hand turn; at and near the point of collision there were no cars parked on the northerly side of the road, nor were there any excavations or obstructions. The night was perfectly clear. At a point about halfway between the easterly extremity of the bridge and the point of collision, appellant, according to his testimony, drew alongside of a car traveling in the southerly lane and at about that time another car, which was likewise traveling in an easterly direction, suddenly and without warning overtook the appellant and passed him on his left in the northerly lane of traffic. This car then passed in front of appellant, cutting across his lane of traffic, and shutting off his view of the road, gradually passing over into the southerly lane of traffic. In the meantime, the car driven by respondent was approaching from the east and, according to appellant, was approaching in the middle lane of traffic unknown to appellant at that time, since his view of respondent's car had been shut off by the intervention of the car which had pulled alongside of him on his left and suddenly passed in front of him. Immediately after the intervening car had cleared out of appellant's path, respondent's car suddenly loomed up in the path of appellant's car in the middle lane of the highway and the cars driven respectively by respondent and appellant sideswiped and collided in the middle lane of the highway. The point of impact was approximately 450 feet from the easterly end of the bridge and opposite a sign on the northerly side of the highway which read: "Slow, Rio Hondo River Bridge."

Respondent contended that the collision took place in the northerly lane of the highway and appellant contended that it took place in the center lane. Appellant concedes that the evidence is conflicting and that there is sufficient substantial evidence to sustain a verdict or finding that the collision occurred in accordance with respondent's evidence. Appellant urges, however, that because of the evidence in support of his contention, and since there were only two actual eyewitnesses to the accident, to wit, respondent and appellant, it was vitally important that the jury "be fully and thoroughly instructed upon the law pertaining to each version of the accident." None of the instructions given by the trial court is criticized. Appellant complains, however, that the failure of the trial court to give three several instructions which he requested with reference to the application of section 123 of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2125) prevented him from having a fair trial and constitutes such prejudicial error as to warrant a reversal of the judgment. Section 123 of the California Vehicle Act reads as follows:

"Whenever any street or highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

"(a) A vehicle shall normally be driven in the lane nearest the right hand edge or curb of the highway when said lane is available for travel except when overtaking another vehicle or in preparation for a left turn.

"(b) A vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

"(c) Upon a highway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle or in preparation for a left turn or unless such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation."

The trial court did give the following instructions predicated on paragraph (a) of said section:

"No. 12. You are instructed that it is provided by paragraph (a) of section 123 of the California Motor Vehicle Act, among other things, as follows:

"'(a) A vehicle shall normally be driven in the lane nearest the right hand edge or curb of the highway when said lane is available for travel except when overtaking another vehicle or in preparation for a left turn.'

"No. 13. You are instructed that it was the duty of the plaintiff Dr. Adams, to at all times operate his automobile as close as practicable to the right hand edge of the

highway. Should you find that at the time and place of the accident the plaintiff, Dr. Adams, did not operate his automobile as close as practicable to the right hand edge of the highway, and that such failure on his part contributed directly and proximately to the happening of the accident, then the plaintiff, Dr. Adams, was negligent."

The first instruction requested by appellant and refused by the trial court, called paragraph (c) of section 123 of the California Vehicle Act to the jury's attention and informed them that "If you find that the plaintiff, Dr. Adams, at the time and place of said accident was driving his automobile in or partially in the center lane of traffic he was guilty of negligence as a matter of law." The other two requested instructions, which were also refused by the trial court, were as follows:

"You are instructed that when a highway is divided into three lanes the center lane thereof is for the exclusive use of vehicles which are overtaking and passing other vehicles, and for vehicles making lefthand turns. It is admitted in this case that the plaintiff, Mr. Adams, was not overtaking or passing any other vehicle and was not preparing to make a lefthand turn. You are therefore instructed that if at the time and place of said accident the plaintiff, Mr. Adams, was driving his automobile in or partially in the center lane he was guilty of negligence as a matter of law, and if such negligence on his part proximately contributed to the accident no matter how slightly, you are instructed that the plaintiff cannot recover and your verdict must be in favor of the defendant, Mr. Warren. * * *

"You are instructed that the defendant, Mr. Warren, was entitled to use the center lane of the highway in question for the purpose of overtaking and passing a vehicle proceeding in the same direction as himself so long as he exercised ordinary care in so doing. This is true, regardless of whether or not in using said center lane his automobile passed to the left of the center of the highway."

[1-3] It is settled that before a party can complain of the refusal of the trial court to give a requested instruction, he must establish that there was sufficient evidence to justify such an instruction and that the instruction properly stated the law. Hamlin v. Pacific Electric R. Co., 150 Cal. 776, 783, 89 P. 1109. It will be noted in paragraph (c) of section 123 of the California Vehicle Act that when a center lane is "allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation," it is perfectly proper to use the center lane of traffic. There is no evidence in the record showing that the highway was not signposted authorizing the use of the middle lane, and in the absence of such proof it would have been error for the trial court to instruct the jury that, if it found from the evidence that respondent was driving his automobile in the center lane of traffic, he was guilty of negligence as a matter of law. Before the requested instructions could be given, the burden of proof rested upon appellant to establish that the highway was divided into three lanes of travel, that the respondent was using the center lane of traffic or a portion thereof and was not overtaking or passing another vehicle, was not in preparation for a left-hand turn and that the highway at that point was not signposted allocating the center lane to traffic moving in the direction in which respondent was traveling. Corcoran v. Pacific Auto Stages, Inc., 116 Cal.App. 35, 2 P.(2d) 225; Vicino v. Amador, 71 Cal.App. 604, 236 P. 369; Pisani v. Martini, 132 Cal.App. 269, 22 P.(2d) 804.

In the Vicino Case, supra, the court says, 71 Cal.App. 604, at page 609, 236 P. 369, 370, speaking with reference to a comparable set of facts:

"Bearing in mind the provisions of the statute just quoted, we shall pass to a consideration of the evidence. The evidence introduced showed the existence of some sign on the side of the highway near the point where the accident happened. But the evidence did not show whether the sign was erected by the trustees of the town of Gilroy, whether the sign was red with white letters thereon, or whether there were any letters on the sign. There was no evidence introduced showing whether there was any building within one-quarter of a mile of the Catholic church hereinabove mentioned.

"In this condition of the record it is manifest that the evidence introduced did not justify the trial court in giving any instruction regarding the law applicable to the operation of motor vehicles in 'a closely built up district.'"

In the Corcoran Case, supra, the court says, 116 Cal.App. 35, at page 38, 2 P.(2d) 225, 226, speaking also with reference to a comparable situation: "But the defendant

did not introduce any evidence that the place was not signposted. To establish a defense of contributory negligence the burden was on the defendants. Code Civ.Proc. § 1869; Kohler v. Wells, Fargo & Co., 26 Cal. 606, 611; Wilson v. California C. R. Co., 94 Cal. 166, 174, 175, 29 P. 861, 17 L. R.A. 685; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 570, 112 P. 454."

It is apparent, therefore, that the trial court properly instructed the jury and the fact that the trial court refused appellant's requested instructions does not constitute prejudicial error for the reason that appellant failed to establish by the evidence that respondent was not within the exception set forth in subdivision (c) of section 123, California Vehicle Act.

[4, 5] The second point urged by appellant is that the verdict is so grossly disproportionate to the actual loss sustained by respondent, as to admit of no other conclusion than that the verdict was the result of passion and prejudice.

Respondent at the time of the accident was 29 years of age and was an osteopathic physician and surgeon, licensed to practice in the state of California since 1928. The injuries suffered were as follows: Shattering of the bones of the left elbow, resulting in a complete loss of the same; the collapse and loss of a part of his right lung, as the result of a bone splinter or blood carried from the elbow by the blood circulation to the right lung; intense pain and suffering requiring the use of anaesthetics and narcotics for a period of several weeks after the injury; the swelling of the arm and drainage of the elbow by the application of three tubes, through which Metaphen and Dakin's solution were alternately run twenty-four hours a day over a period of several weeks; confinement in the hospital five and a half weeks from the date of the injury; complete severance of the triceps muscles which lower and raise his arm; a permanent stiffness of the elbow requiring the selection of a position in the healing thereof for purposes of affording respondent the most practical position for future use in its stiffened condition; the inability to perform his professional services from the date of the accident until March 15, 1934, during which time he was required to keep the arm in a plaster of paris cast; a permanent 35 per cent. loss of the use of his left arm; the development of pneumonia, proximately caused by the loss of the lower right lobe of his lung; the spitting of blood and the intense pain and suffering resulting therefrom; terrific pains in the joint and down in the wrist since the injury while attempting to lift heavy articles; $350 paid for special nurses; $399.35 paid for hospital; $30 for the loss of a wrist watch; $30 for the loss of a suit of clothing; damage to his automobile; the complete loss of net earnings at the rate of $500 per month from the date of the accident to about December 15, 1933; partial disability of earnings from December 15, 1933, up to the time of the trial; and a permanent and partial disability of 75 per cent. in performance of future surgical services. There was no showing of his present income at the time of the trial, or that it was any less than at the time of the accident. Nor was there any evidence that it was necessary for respondent to have associated with him a doctor to take care of his present and future patients. The evidence shows that he has performed operations since the accident, that he is able to sew up scalp wounds, remove cysts, remove growths in the rectum; that he does obstetrical work, including the actual delivery of babies; that he sees as many as twenty-five patients a day, and gives electrical and osteopathic treatments. The evidence also shows that from the time of his return from the hospital on September 25, 1933, and to December 15, 1933, he worked in his office taking care of patients with the assistance of a doctor, whose work he supervised, and that since December 15, 1933, he has taken care of his patients without the assistance of any associate doctor.

In the case of Holden v. Patten-Blinn Lumber Co., 45 P.(2d) 1037, at page 1039, this court said, quoting from the case of Morris v. Standard Oil Co., 188 Cal. 468, 473, 205 P. 1073: "'The question of excessive damages is one that is first addressed to the trial court. Practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270–286, 113 P. 366, 48 L.R.A.(N.S.) 687, Ann.Cas. 1912C, 50; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Bisinger v. Sacramento Lodge, etc., 187 Cal. 578, 203 P. 768.' Holmes v. California Crushed

Fruit Co., 69 Cal.App. 779, 232 P. 178; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Campbell v. Bradbury, 179 Cal. 364, 375, 176 P. 685; Wallace v. Pacific Electric R. Co., 105 Cal.App. 664, 288 P. 834; Rannard v. Harris, 113 Cal.App. 15, 297 P. 623."

There is nothing in the record which at first blush, or at all, suggests passion, prejudice, or corruption on the part of the jury. The evidence demonstrates substantial injuries and leaves no doubt that plaintiff suffered considerable physical pain and mental anguish over an extended period of time. Even though this court, if it had sat as a trial court, may have awarded a lesser sum, it is established that such a situation furnishes no cogent reason for setting aside a verdict of a jury, otherwise free from legal criticism.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 237

In re PURCELL'S ESTATE.

HOWELL v. JONES.

Civ. 5510.

District Court of Appeal, Third District, California.

Jan. 15, 1936.

Rehearing Denied Feb. 14, 1936.

1. Executors and administrators ⊂=20(7)

Evidence sustained finding that petitioner was illegitimate daughter of deceased, who had been publicly acknowledged and received into his family, so as to be entitled to letters of administration in preference to deceased's sister (Probate Code, § 452; Civ.Code, § 230).

2. Evidence ⊂=291

Neighbors and friends of family *held* competent to testify to declarations of deceased husband and wife regarding paternity of child who was treated as member of family (Code Civ.Proc. §§ 1852, 1870, subd. 4; Civ.Code, § 230).

3. Evidence ⊂=291

Declarations of deceased wife that child, treated as member of family, though not her own daughter, was daughter of her deceased husband and her sister, *held* competent on question of pedigree, in proceedings to determine prior right to letters of administration on husband's estate (Code Civ.Proc. §§ 1852, 1870, subd. 4; Probate Code, § 452; Civ.Code, § 230).

4. Bastards ⊂=6

Evidence as to identity of mother need not preclude possibility of her being married at time of conception or during period of gestation, if illegitimacy of child is otherwise shown.

5. Evidence ⊂=309

Preliminary proof that person was member of family must be first introduced before declarations of other members of family are admissible on question of pedigree (Code Civ. Proc. §§ 1852, 1870, subd. 4).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Proceedings by Harriett J. Jones for letters of administration in the estate of G. E. Purcell, also known as Ed Purcell, deceased. From an order revoking letters issued to Ida May Howell and granting letters of administration to petitioner, Ida May Howell, as an individual and as administratrix, appeals.

Affirmed.

Mannon & Brazier, of Ukiah, for appellant.

Lilburn Gibson, of Ukiah, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was made pursuant to section 452 of the Probate Code revoking the letters of administration previously issued to Ida May Howell, the sister of George E. Purcell, deceased, and granting letters of administration of his estate to Harriett J. Jones, the daughter of said deceased. In effect the court found that Harriett J. Jones was the illegitimate daughter of the deceased and that she was legally adopted by him in his lifetime pursuant to the provisions of section 230 of the Civil Code, constituting her his heir and giving her prior right to letters of administration of his estate over his sister.

The chief issue on this appeal is an alleged failure to prove that the petitioner is an illegitimate daughter of the de-

ceased, for lack of evidence of the identity of her mother and for failure to prove that she may not have been conceived in lawful wedlock or that her mother was unmarried.

[1] There is a sharp conflict of evidence, but we are of the opinion there is ample proof to support all of the necessary elements of the illegitimacy and of the adoption of the petitioner under the provisions of section 230 of the Civil Code.

George E. Purcell died intestate in Mendocino county September 23, 1934, possessed of real and personal property of the value of $4,300. Upon application therefor, letters of administration of his estate were duly issued to Ida May Howell, surviving sister of the deceased, on October 24, 1934. November 13, 1934, Harriett J. Jones filed her petition in said estate under the provisions of section 452 of the Probate Code, asking for revocation of the letters of administration previously issued to Ida May Howell, and requesting that letters be granted to her as the daughter of the deceased. Upon the hearing of this petition, it appears that George E. Purcell and Frances Jones were married prior to 1898 and lived as husband and wife in Mendocino county until the death of his wife in 1933. There were no children born as the issue of that marriage. In 1900 and for at least a year thereafter, there were living in the household of Mr. and Mrs. Purcell her two sisters, Annie and Susie. Annie was previously married to a man by the name of Fish. In 1903 she married John Travis. There is no evidence that Susie was ever married. She retained her maiden name of Susie Jones. She was physically and mentally deficient. She was afflicted with occasional epileptic fits. She was characterized as feeble-minded. She was later committed to the state Home for Feeble-Minded Persons at Eldridge, where she died. Gertrude Yates testified that Mrs. Purcell told her that while Susie lived with the Purcell family during 1900, she and Susie went away for the summer. This was the summer during which Harriett was born. Mrs. Yates testified in that regard: "They lived in Covelo but [Mrs. Purcell] led me to believe she had her sister for the summer somewhere, and I don't know where." It appears that later Susie was not in good favor in the Purcell family. Mr. Tracy testified in that regard: "She [Susie] was a person we didn't show any disposition to be friendly with because they didn't seem to want you to be friendly to her, and [they] otherwise ignore(d) her presence."

The petitioner testified she was born July 17, 1900. She had no actual knowledge regarding the identity of her parents. She supposed she was the daughter of Mr. and Mrs. Purcell. She was always treated by them as their daughter. She was known by no other name than that of Harriett J. Purcell until she married. She was referred to by both of them as their daughter. She lived in their household as their daughter until, at the age of sixteen years, she married a man by the name of Jones, who was not related to Mrs. Purcell's family, although he bore the same name. She was educated, clothed, fed, and cared for by the Purcells in every respect as though she were their daughter.

Mr. Tracy, a banker of Ukiah, testified that he had known Mr. and Mrs. Purcell ever since the spring of 1900; that Mr. Purcell took up a government claim near the one which he owned at Westport; they were always the best of friends. He frequently visited in their home. He testified that "when they were living in the mountains" Mrs. Purcell's mother and her sisters Annie and Susie were living with them; that "Susie made her home with Frances [Purcell]." Soon after they located on the mountain claim, Mrs. Purcell went away and brought Harriett to their home as a "baby in her arms." Edith Walters also testified that Mr. Purcell told her in the summer of 1900, "my wife has gone to the city to get a little girl to raise." Mr. Tracy testified that the baby was brought to their home by Mrs. Purcell when she "returned from San Francisco. * * * It strikes me it was summer [when the baby arrived at their home]. * * * I would think it was in the neighborhood of three weeks or a month old. * * * That was in the summer of 1900." He asserted that Mrs. Purcell said that Hattie was "their child." Years later Mrs. Purcell made a will which she left with their friend, Mr. Tracy. By its terms she devised all of her property to her husband. After her death in 1933, Mr. Tracy handed the will to Mr. Purcell, who noticed that disposition of the property by the terms of the will and remarked to Tracy that it was all right "as she [Hattie] was his daughter." Mrs. Tracy, who formerly taught school at Twin Rocks near the

Purcell home, and afterwards married Mr. Tracy, also knew the Purcells intimately. She frequently talked with them. She testified that Mrs. Purcell often said "Hattie is ours," and that Mr. Purcell often referred to her as "my daughter." When Hattie married in 1916, Mr. Purcell was disappointed and said to Mrs. Tracy: "It hurts me to have my own daughter marry that fellow." He frequently called her "his daughter" in the presence of strangers to the family. Seven old-time friends of the family testified they had heard Mr. Purcell say that Harriett was "his daughter" and "his own child" and similar acknowledgments of his paternity of the child. Gertrude Yates, who had known the Purcell family for nineteen years, and who frequently visited with them, testified that once when she called there with Mrs. Bunker, Mrs. Purcell told them that Hattie was not her child. Upon further inquiry, she added, "No, she is Mr. Purcell's, but not mine. * * * Being she was her own sister's child and Mr. Purcell's, she felt like she should take the child and raise it and do what she could by it." She identified the sister whom she designated as the mother of Harriett, as Susie Jones, who lived in their household in the year 1900. She apologized for her conduct by explaining that Susie "was not a very bright woman through sickness or something and it left her kind of feebleminded." She repeatedly said that Hattie was not her own child, and, on the contrary, that she was the daughter of "my own sister and Mr. Purcell. * * * Q. Did she tell you whether she knew that Hattie was an illegitimate child at the time she took her into their home? A. Yes, that she was Mr. Purcell's child and her sister's."

The foregoing evidence furnishes adequate proof that Harriett J. Jones is the illegitimate daughter of George E. Purcell and Susan Jones, the unmarried sister of Mrs. Purcell, and that she was publicly acknowledged by Mr. Purcell as his daughter, and received as his child into his home and family with the consent of his wife, Frances; that she was treated by them in every way as if she were their legitimate child, and that she thereby became adopted, legitimated, and entitled to inherit her father's property as an heir at law, under the provisions of section 230 of the Civil Code. That section provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth."

[2, 3] It was competent for neighbors and friends of the Purcell family to testify to declarations of either Mr. or Mrs. Purcell regarding the paternity of Harriett J. Jones. Section 1852, Code Civ. Proc.; section 1870, subd. 4, Code Civ. Proc.; In re Estate of Heaton, 135 Cal. 385, 67 P. 321; In re Estate of Flood, 217 Cal. 763, 782, 21 P.(2d) 579; Jones, Evidence in Civil Cases (3d Ed.) p. 472, § 312. In the Heaton Case above cited, on a contest over the application for letters of administration of the estate of Warren D. Heaton, deceased, by Jennie M. Heaton, who claimed to be the illegitimate daughter of the deceased, who was adopted under the provisions of section 230 of the Civil Code, the admissions in evidence of declarations of Mr. Heaton and his wife, whom he subsequently married, were received on the ground that such admissions constitute an exception to the general rule of evidence and render competent the admissions of a deceased member of the family regarding the pedigree of a member of that family. This rule of evidence is recognized by section 1852 of the Code of Civil Procedure, which provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

In the case of In re Estate of Flood, supra, it was also held that not only were the admissions of the alleged father of an illegitimate daughter, and of his wife, admissible, on the subject of pedigree, but that the declarations of the mother, the brother and the sister of Mrs. Flood, being related to the father of the child by marriage, were also admissible under the provisions of section 1870, subdivision 4 of the Code of Civil Procedure. Evidence of the declarations of Mrs. Purcell in the present case to the effect that Hattie was the daughter of her husband and that she was not her own daughter, and the further statement that Susie, the sister of Mrs. Purcell, was the mother of Harriett, were competent on the question of pedigree.

[4] It is true that "there is no presumption of law more firmly established and founded on sounder morality and more convincing reason than the presumption that children born in wedlock are legitimate." 1 Jones, Commentaries on Evidence, 2d Ed., p. 118, § 64. But this rule does not apply in civil cases in the absence of proof that the child is born in lawful wedlock, so as to require the affirmative proof of the identity of the mother of the alleged illegitimate child and evidence precluding the possibility that she was not married at the time the child was conceived or during the period of normal gestation, provided the illegitimacy of the child is otherwise shown. In the present case the evidence is conclusive that George E. Purcell was married and lived with his wife, Frances, during the entire period of gestation and for more than a year prior to the birth of Harriett. He admitted that she was his daughter, and his wife declared that Harriett was not her child. Assuming those statements to be true, it necessarily follows that she was the illegitimate child of Mr. Purcell, regardless of who her mother may have been. But, even if the rule contended for by the appellant be correct that there is a presumption that her mother may have been married and living under such circumstances that the law will presume the child to have been born in lawful wedlock, that contingency is refuted by the testimony in this case. Mrs. Purcell declared that Harriett was the daughter of Mr. Purcell and of her own sister, Susie, who then lived in their home under her maiden name of Jones, and that the inmates of their home then consisted of only herself, her husband and her two sisters Annie and Susie. No other man was a member of that household. Susie was in the custody of her sister, Mrs. Purcell, until she was later committed to the Sonoma State Home for Feeble-Minded Persons at Eldridge, where she subsequently died. In the absence of proof to the contrary, this furnishes ample evidence that Susie, the mother of Harriett, was an unmarried woman, and refutes the theory that she may have been born in lawful wedlock.

[5] It is true that before the declarations of Mrs. Purcell could be received in evidence regarding the pedigree of Harriett, preliminary proof that she was a member of the family involved, must be first established. In re Estate of Hartman, 157 Cal. 206, 210, 107 P. 105, 36 L. R.A.(N.S.) 530, 21 Ann.Cas. 1302; 3 Jones, Commentaries on Evidence, 2d Ed., p. 2081, sec. 1132; 2 Wigmore on Evidence, p. 1853, sec. 1490. The fact that Mrs. Purcell was the wife and a member of the family of George E. Purcell, and that Harriett was also a member of that family was conclusively established by the testimony of numerous friends and neighbors, independently of her evidence. That rule of evidence was fully complied with.

There appears to be no reasonable doubt that Harriett is the illegitimate daughter of the decedent, George E. Purcell, that her mother was Susie Jones, the unmarried sister of Mrs. Purcell, and that she is entitled to letters of administration as the duly adopted child under the provisions of section 230 of the Civil Code, and as such is entitled to inherit her father's estate as his heir at law.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



11 Cal.App.2d 362

WALLIS et al. v. CARDER et al.

Civ. 10306.

District Court of Appeal, Second District, Division 1, California.

Jan. 22, 1936.

Pleading ⇐428(3)

Complaint alleging reliance on fraudulent representations in purchase of realty, *held* sufficient as against objection to introduction of evidence, although vulnerable as against special demurrer for failure to allege verbatim that plaintiffs were ignorant of true facts.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Edward T. Wallis and another against Augustus W. Carder and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

John A. Jorgenson, of Los Angeles, for appellants.

Overton, Lyman & Plumb, and Cecil A. Borden, all of Los Angeles, for respondent Los Angeles Mountain Park Co.

A. J. Verheyen, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

ROTH, Justice pro tem.

Appellants, as plaintiffs, sued respondents for damages because of fraudulent representations made to them by respondents, inducing them to purchase a lot from the Security-First National Bank, acting in its capacity as administrator with the will annexed of the estate of Lepper, hereinafter referred to as "bank." The respondents Carder and Los Angeles Mountain Park Company, hereinafter referred to as "company," acted as agents and brokers of said bank. When the case was called for trial, bank and company joined in an objection to the evidence. The objection was sustained and appellants were given leave to amend conditioned upon postponement of the trial. Appellants decided to amend forthwith, and requested permission to do so, which the trial court refused. Thereupon the trial court granted judgment in favor of all respondents, although the record does not show that respondent Carder joined in the objection to the evidence, or took any part in the proceedings thereon. The basis of the objection to the evidence was that there were no material actionable misrepresentations alleged in the complaint. The representations alleged by the complaint are: (1) That at a previous time bank had made a loan of $3,000 on the property involved; (2) that the property could be purchased for $2,825, because the bank had foreclosed its mortgage thereon; (3) that the boundary lines of the property pointed out to appellants, when they inspected the lot prior to their agreement to purchase the same, were not the true boundary lines. The complaint does not allege in so many words that appellants were ignorant of the true facts, but it does allege: "That plaintiffs believed in and relied upon such representations and were induced thereby to purchase, and did purchase, said lot for the total sum of Twenty-eight Hundred and Twenty-five Dollars ($2825.00) * * *." The complaint further alleges the falsity of each and every representation made. The pleading would be vulnerable as against a special demurrer, but in our opinion is sufficient as against an objection to the evidence. Spreckels v. Gorrill, 152 Cal. 383, 386, 387, 92 P. 1011.

In the case of Estes v. Edgar Zinc Co., 97 Kan. 774, 156 P. 758, it is said: "It does not take much of a pleading to be good against an objection to the introduction of evidence. Conclusions which apprise the opposite party of what is claimed are sufficient against such an objection, and, indeed, conclusions of that kind are sufficient against a formal demurrer when no motion to make definite and certain has been interposed. Besides this, as the court has remarked on numerous occasions, the important thing is not whether the technical requirements of the old artificial system of framing sharp issues has been complied with, but whether the plaintiff has stated what he claims in such a way that the defendant may know what he has to meet."

We have read the complaint in its entirety and find it substantially complete even when viewed from a technical perspective. There is no question in so far as formal pleading is concerned that all the representations set out are material ones, that they were relied upon, and that the contract of purchase and sale would not have been entered into if they had not been made. The complaint states a cause of action and the objection to the evidence should have been overruled.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

owned all of new ditch without easement and that defendant's predecessor owned two-thirds of old ditch with right in plaintiff's predecessors to flow three cubic second feet of water through it. Facts particularly found were that there never had been but one ditch, and that plaintiff and its predecessors owned easement therein to flow three cubic second feet of water through it.

5. Waters and water courses ⇐257(1)

Superior court judgment requiring defendant to flow plaintiff's water through diversion ditch at charge for maintenance rather than at rates imposed by orders of Railroad Commission, which were not void on their face, *held* erroneous, since superior court had no jurisdiction directly or indirectly to overrule order of Railroad Commission (St.1933, p. 1157, § 67).

6. Waters and water courses ⇐140

Where plaintiff's right to divert three cubic second feet of water was equal and not superior to defendant's right to divert six cubic second feet, judgment recognizing plaintiff's right to divert three cubic second feet and enjoining defendant from interfering therewith *held* improper, as making plaintiff's right superior in case of water shortage, and judgment was modified to provide that plaintiff's and defendant's rights were equal and that deficiency must be borne one-third by plaintiff and two-thirds by defendant (Code Civ.Proc. § 956a).

5 Cal.2d 103

WALLACE RANCH WATER CO. v. FOOTHILL DITCH CO.

L. A. 14361.

Supreme Court of California.

Dec. 31, 1935.

1. Easements ⇐48(6)

Mere relocation by mutual consent of right of way or other easement does not alter rights of owner of easement.

2. Trial ⇐395(1)

Incorporation of stipulation and judgment in action brought against plaintiff's predecessors and defendant's predecessor into findings of fact in subsequent case made recitals of stipulation and judgment, findings of fact in subsequent case.

3. Trial ⇐398

When general finding conflicts with special finding, special finding controls.

4. Appeal and error ⇐1149

In action to quiet title to water diverted from river and to interest in diversion ditch, where there was conflict between facts particularly found by trial court and those incorporated in findings by including therein stipulation and judgment in prior action brought against plaintiff's predecessors and defendant's predecessor, conflicting portions of stipulation and judgment in prior action may be stricken by the appellate court (Code Civ.Proc. § 956a).

Facts found from prior action showed that there were two separate diversion ditches and that defendant's predecessor

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by the Wallace Ranch Water Company against the Foothill Ditch Company. From a judgment for plaintiff, defendant appeals.

Affirmed as modified.

Prior opinion, 46 P.(2d) 252.

McFadzean & Crowe, Farnsworth, Burke & Maddux, James K. Abercrombie and Feemster, Perkins & McCormick, all of Visalia, for appellant.

H. B. McClure, of Visalia, and Freston & Files and James A. McLaughlin, all of Los Angeles, for respondent.

SHENK, Justice.

Plaintiff, a mutual water company, brought this action to quiet its title as against defendant, a public utility, to three cubic feet of water per second, diverted from the Kaweah river, and to quiet its title to a one-third interest in the Foothill

ditch by which the water is diverted from the river to the Wallace ranch. Only that portion of the ditch from the point of diversion in the river to plaintiff's place of use is involved in this action, plaintiff claiming no interest in the ditch beyond the Wallace ranch. The answer of defendant admits plaintiff's ownership of the water right and admits that plaintiff has the right to have its water flow through the ditch, but alleges that the sole ownership of the ditch rests in defendant, and that plaintiff has no interest therein. Other issues were incidentally raised by the pleadings, but the main question presented for determination to the trial court was whether plaintiff has any interest in the Foothill ditch.

The trial court held that plaintiff has a perpetual easement in the ditch to convey its water to its properties. On this appeal, defendant makes three main contentions:

1. First, it is contended that there is an irreconcilable conflict and a fatal inconsistency in the findings of fact.

2. Second, defendant contends that by certain provisions of the judgment hereafter referred to, the trial court, contrary to the provisions of section 67 of the Public Utilities Act (St.1915, pp. 115, 161, as amended, St.1933, p. 1157), has, in effect, nullified certain orders of the railroad commission.

3. In the third place, defendant contends that the trial court committed reversible error in that it failed to find that defendant's right to divert six cubic feet of water through the ditch was equal to and not inferior to that of plaintiff.

In order to understand defendant's first contention, it is necessary to refer to the evidence and to the findings. The trial court specifically found that plaintiff was "at all times herein mentioned entitled to the possession of a perpetual easement and water right in and to said Foothill Ditch, formerly known as the Pogue, Wallace and Crocker Ditch, from the head thereof at a point in Section Twenty-six (26), Township Seventeen (17) South, Range Twenty-seven (27) East, M. D. B. & M., down to and near the Southwest corner of the Southeast quarter of Section Nine (9), Township Eighteen (18) South, Range Twenty-Seven (27) East, M. D. B. & M., being a distance of about four miles from the head of said ditch, and the right to divert and flow through said Foothill Ditch the said three (3) cubic feet of water per second, and that said easement and water right is now and was at all times herein mentioned appurtenant to the lands of the stockholders of plaintiff herein, and their predecessors in interest; and that the said plaintiff has the right to divert said three (3) cubic feet of water per second from said Kaweah River, by means of said Foothill Ditch, also known as Pogue, Wallace & Crocker Ditch, or any other ditch, or at any other point on said river, or by any other means it may provide." The court also found that "* * * the said ditch does now and has at all times since its construction prior to said decree of 1883 followed a course from this point of diversion from the said Kaweah River in a southwesterly direction through the lands described in the said decree of partition and other lands; that the said ditch has been known and designated by various names, among others as 'Pogue, Wallace and Crocker Ditch,' 'Pogue's Lower Ditch,' and 'Wallace Ranch Water Company's Ditch,' and is now known as and will be referred to herein as, the 'Foothill Ditch'; that, although the respective predecessors in interest of plaintiff and defendant have changed the point of diversion of the said ditch in the Kaweah River from time to time, the said point of diversion has always been at substantially the same point, and, upon any change in the point of diversion of the said ditch or in the course which the said ditch has taken or followed through the lands hereinabove described and referred to, both plaintiff's predecessors and defendant's predecessors have used the same ditch as so changed in course and in point of diversion from time to time, and plaintiff and plaintiff's predecessors have each and all used the said ditch and have claimed the right to use the said ditch and to divert the said three (3) cubic feet of water from the Kaweah River through the said ditch and to transport said three (3) cubic feet of water through the said ditch to the lands supplied and irrigated by the said three (3) cubic feet of water, as aforesaid."

Defendant contends that by certain other findings the trial court found that the present ditch is not a relocation of the old one; that there are two ditches; that defendant is the sole and absolute owner of the Foothill ditch and that plaintiff has no interest therein. The judgment was based on the above-quoted findings. As we read the record, the overwhelming weight of evidence supports the quoted findings. The

following portions of the statement of facts appearing in the opinion of the District Court of Appeal, Fourth Appellate District, prepared in this cause when it was pending before that court, correctly portray the facts involved and are hereby adopted as part of the opinion of this court:

About the year 1857, John Swanson owned land in what is now Tulare county and which was riparian to the Kaweah river, and by means of a ditch diverted water from the river which he put to beneficial use on his property. Shortly after 1863 the land, ditch, and water rights were acquired by J. W. C. Pogue, W. H. Wallace, and C. W. Crocker as tenants in common. In 1875 they enlarged the ditch, which became known as the "Pogue, Wallace and Crocker Ditch," and increased the amount of water appropriated and put to beneficial use. In 1877 they constructed a dam in the channel of the river, just below the head of this ditch, to maintain the flow of water they had been diverting. This diversion dam remained intact in the river until the early part of 1890.

Prior to November 2, 1883, J. W. C. Pogue acquired the one-third interest of C. W. Crocker in the land, ditch, and water rights. W. H. Wallace had died and Emeline Wallace was the duly appointed, qualified, and acting administratrix of his estate. J. W. C. Pogue brought an action against the administratrix and the heirs at law of the deceased, and a decree of partition was rendered on November 2, 1883. The land and water was divided between the parties and the decree confirmed the report of the referees appointed to partition the property. In this report we find that the lands allotted to Pogue were to be "charged with the servitude hereinafter specified." The report then proceeded to set apart a portion of the property to the defendants and provided that "said referees have further set apart and allotted to the said defendants Emeline Wallace, Cora A. Wallace and William Henry Wallace, and as appurtenant to said lands allotted to them as aforesaid, a perpetual easement and right of way, on and across said lands allotted to J. W. C. Pogue as aforesaid to flow and convey over and across the same and in said water ditch, one-third of all the water appertaining to the said ditch or which the said ditch may lawfully divert from said Kaweah River." The decree of partition contains the following: "And it is further ordered, adjudged and decreed that said defendants, Emeline Wallace, Cora A. Wallace and William Henry Wallace are the owners, as appurtenant, to said lands last above described, of a perpetual easement and right of way, on and across the said lands hereinbefore adjudged and allotted to said plaintiff J. W. C. Pogue, to flow and convey over and across the said lands, in that certain irrigation ditch, situate thereon and referred to in said Referees' report, one third of all the water appurtenant to said ditch, and which said ditch may lawfully divert from the Kaweah River."

Plaintiff derives its title to its water right and interest in the ditch from Emeline, Cora A., and William Henry Wallace; and defendant derives its title from J. W. C. Pogue, each through various mesne conveyances. Up to, at least, 1890 the ditch was called the "Pogue, Wallace and Crocker Ditch."

In 1890 the dam across the river was blown out. Pogue proceeded to construct another intake for the ditch. He went down stream about 600 feet and built another dam, dug through the river bank into a slough which was sometimes referred to as an old bed of the river, dammed the slough about 1200 feet from the opening, and diverted the water into a new ditch which extended southwesterly for about half a mile where it joined the Pogue, Wallace and Crocker ditch. Thereafter Pogue and his successors in interest diverted their water from the Kaweah river through this ditch. Defendant maintains that this new ditch and its subsequent extensions to the Wallace ranch has always been known as "Pogue's Lower Ditch" to distinguish it from the original Pogue, Wallace and Crocker ditch.

Just how the Wallace ranch owners obtained their water for several years after 1890 is not at all clear from the record. We gather and will assume from the testimony of C. E. Goodale, who was superintendent (lessee part of the time) of the Wallace ranch from 1895 to 1926, that it was taken out at the old Pogue, Wallace and Crocker heading and through the old Pogue, Wallace and Crocker ditch until 1896. In that year this dam was blown out and thereafter their water was taken from the river through the new Pogue heading and the ½ mile of new ditch which Pogue had constructed. Goodale testified: "I was friendly with Pogue and I arranged with him to take it out there." Portions of the old Pogue, Wallace and

Crocker ditch were visible at the time of the trial in 1931, but after 1896 it is probable that no water had been conveyed through that portion of it above its junction with the new ditch constructed by Pogue.

By stages, and between 1896 and probably about 1906, the new ditch, the first half mile of which Pogue had constructed in 1890, was continued as a ditch separate from the old Pogue, Wallace and Crocker ditch, to a point about 300 yards into the Wallace ranch property where it joined the old ditch which, at the time of the trial, continued through the Wallace ranch in about its original location and had been continued several miles beyond the boundaries of the Wallace ranch. By 1914 the new ditch had been replaced with a flume which was generally constructed in or over the ditch except in one place when a broad curve was eliminated. There is no showing that the plaintiff or its predecessors in interest contributed anything towards building the new ditch and flume. They were not charged anything for flowing their water through it for a number of years.

Plaintiff maintains that the new ditch was known indiscriminately as the "Pogue, Wallace and Crocker Ditch," "Pogue's Lower Ditch," and the "Foothill Ditch." Defendant maintains that it was known as "Pogue's Lower Ditch," "Bonnie Brae Ditch," and the "Foothill Ditch" and never as the "Pogue, Wallace and Crocker Ditch," which, according to its contention, was the exclusive name of the original ditch constructed by the three joint tenants whose names it bears.

Defendant maintains that the partition decree of 1883 gave plaintiff's predecessors in interest an easement in the old original Pogue, Wallace and Crocker ditch and in this alone; that there is no easement in the new ditch and that plaintiff has no property or interest in it other than the right to require defendant to divert 3 cubic feet a second of water from the Kaweah river and flow it through the new ditch to the Wallace ranch lands; that as it is a public utility plaintiff must pay the charges fixed by the Railroad Commission for these services. We do not understand that defendant contends that plaintiff cannot require it to divert the water from the Kaweah river and convey it to the Wallace ranch properties.

Plaintiff contends that it is the owner of an easement in the new ditch and that it can flow its water through that ditch and is, or may be, liable for one-third of the cost of its maintenance and operation. It maintains that the new ditch is a change of location of the old one which was made gradually over a period of years for the convenience of defendant and its predecessors in interest and that plaintiff is the owner of an easement in the new ditch. From this premise, plaintiff argues that as it is not a public utility the Railroad Commission has no jurisdiction and no right to impose a charge upon plaintiff for conducting its own water through its own right of way. The trial court generally found in accordance with plaintiff's contentions and rendered judgment accordingly.

Whether there were two separate ditches or only one which was merely a relocation of the first ditch is of vital importance to a settlement of this portion of the controversy between the parties. The names by which the new ditch as well as the original ditch were known must have an important bearing on its ultimate determination.

The parol evidence in the record is in conflict on the name bestowed on the new ditch. The documentary evidence is illuminating. The deed from Cora Wallace Morton (formerly Cora A. Wallace and who acquired the interests of Emeline and William Henry Wallace) and James H. Morton, her husband, to plaintiff, dated October 17, 1907, contains the following: "Also all the right, title and interest which the said parties of the first part or either of them have in or to those certain ditches known as the Pogue, Wallace & Crocker Ditch; the ditch known as Pogue's Lower Ditch; and the ditch known as and called the Bonnie Brae Ditch; or the ditch of the Central Water and Irrigation Company. Together with all water and water rights in the waters of the said Kaweah River owned by the parties of the first part or either of them, by reason of the ownership by said parties of the first part, or either of them of any interest in the said ditches above named or either of them, or of the waters diverted by said ditches or either of them." The Central Water & Irrigation Company was a predecessor in interest of defendant. The first document in defendant's chain of title after the partition decree of 1883 is a deed from J. W. C. Pogue to Edward Records dated May 29, 1906. This deed contains the following: "And the said party of the

first part doth hereby sell, assign, transfer and convey unto the said party of the second part all the right, title, interest and estate of the party of the first part, in and to that certain water ditch known as Pogue, Wallace and Crocker Ditch, and sometimes known as 'Pogue's Lower Ditch,' which said ditch commences in the Kaweah River. * * *" In it are also repeated phrases similar to the following: "Also, all that portion of the northwest quarter of said section two, in township eighteen south, range twenty seven east, lying north of the south bank of said Pogue, Wallace and Crocker Ditch, also called 'Pogue's Lower Ditch.'" The description of the ditch as the "Pogue, Wallace and Crocker Ditch," sometimes known as "Pogue's Lower Ditch," is repeated with immaterial variations in the following exhibits introduced by defendant in tracing its chain of title: Deed dated April 6, 1906, Edward Records to Central California Water & Irrigation Company; deed of trust dated July 16, 1906, Central California Water & Irrigation Company to Mercantile Trust Company as trustee; deed dated April 11, 1913, of H. B. McClure, commissioner on foreclosure of the foregoing deed of trust, to W. J. McLean, L. J. De Sabla, and Jules Mathieu; deed dated April 14, 1913, from W. J. McLean, Jules Mathieu, and Anne Mathieu, his wife, and Leon De Sabla to H. T. Miller; deed dated June 26, 1913, from H. T. Miller and Blanche Miller, his wife, to T. M. Dungan; deed dated September 26, 1913, from T. M. Dungan to Rosa S. Spaulding; deed dated April 15, 1914, from Rosa S. Spaulding to R. C. Merryman; deed dated May 6, 1914, from R. C. Merryman and Agnes H. Merryman, his wife, to Foothill Ditch Company.

In February, 1926, the Foothill Ditch Company filed its application with the Railroad Commission seeking permission to sell its property to the Lindsay-Strathmore Irrigation District. The application contained the following: "That the ditch, right of way, water rights and appurtenances which it is sought to transfer are described as follows, to-wit: All that certain water ditch or conduit and the concrete pipe line constituting an extension thereof now known as the Foothill Ditch, and formerly known as the Pogue, Wallace and Crocker Ditch, and sometimes known as Pogue's Lower Ditch. * * *" Attached to the application is the copy of a proposed contract of sale in which the foregoing description was repeated. A list of names of "Consumers of Water from Foothill Ditch as of January 1, 1926," was also filed which does not contain the name of plaintiff. In this exhibit the following appears:

"Wallace Ranch Rights.

"The rights of the successors in title and interest of Emmaline Wallace, Cora Wallace and William Henry Wallace, as defined in a certain judgment and decree confirming report of referees, filed November 2, 1882, in a certain action then pending in the Superior Court of the County of Tulare, State of California, No. 671, wherein J. W. C. Pogue was plaintiff and Emmaline Wallace, Administratrix of the Estate of William H. Wallace, Deceased, Emmaline Wallace, Cora Wallace, William Henry Wallace, George W. Locke and Samuel Lavenson were defendants.

"Also, the rights, if any, of Cora Wallace Morton and her husband J. H. Morton, and their successors in title and interest, secured or arising out of a certain judgment dated January 26, 1904, entered in an action then pending in the Superior Court of the County of Tulare, State of California, No. 4657, wherein R. E. Hyde and the Wutchumna Water Company, a corporation, were plaintiffs, and the Kaweah Power and Water Company, J. W. C. Pogue, W. G. McVey, Harry Wilkson and others were defendants.

"The right of Cora Wallace Morton and James H. Morton, if any, under a certain modified judgment dated July 30, 1909, and entered in an action then pending in the Superior Court of the County of Tulare, State of California, No. 4823, wherein the Consolidated Peoples Ditch Company, a corporation, was plaintiff and J. W. C. Pogue, the Kaweah Power and Water Company, a corporation, Cora Wallace Morton and James H. Morton were defendants."

We have already quoted from the decree of partition dated November 2, 1883, incorrectly given as 1882 in the foregoing quotation. We do not find in the record any judgment dated January 26, 1904, in the case of R. E. Hyde and Wutchumna Water Company v. Kaweah Power & Water Company, J. W. C. Pogue, et al. There is a judgment dated October 18, 1909, bearing the same number and with the same parties plaintiff. It appears from the judgment roll in that case that Pogue had succeeded to the interest of the Kaweah Power & Water Company and that the Central California

Water Company had succeeded to the interest of Pogue and had been substituted as defendant in his place. The judgment is based on a stipulation and it is recited that the substituted defendant had the right to divert from the Kaweah river, subject to diversions by the plaintiffs (Hyde et al.), 6 second cubic feet of water "through the said Pogue, Wallace and Crocker Ditch, sometimes called Pogue's Lower Ditch, at the head-gate of said Ditch." An amendment to the answer of Pogue in that case filed on February 26, 1902, contains the following allegations: "And this defendant further alleges that after the partition of said land first above described, between this defendant and his said associate, said C. W. Crocker, and the heirs at law of said W. H. Wallace, as hereinbefore stated in this paragraph of this answer, up to the commencement of this action, this defendant continued to own and use, a two third undivided interest in and to said Pogue, Wallace and Crocker ditch, and to the water diverted thereby, and that ever since the latter part of the year 1883, he has used said Pogue, Wallace and Crocker ditch, for the irrigation of three hundred acres of land." We cannot find in the record the modified judgment dated July 30, 1909, in the case of Consolidated Peoples Ditch Company v. J. W. C. Pogue et al.

Receipts from the year 1914 to the year 1931 for taxes paid by defendant are in the record. In all of these receipts the following description is used: "Pogue, Wallace & Crocker Ditch which commences in Kaweah River 17 miles of ditch 1 mile of flume 6 miles fence." In the later receipts (beginning 1922), the word "Co." is inserted after the word "ditch" and "no fencing" is substituted for "6 miles fence." Also in some receipts "which commences" is omitted and in others "which com." is used.

Under date of May 29, 1923, the attorney for defendant wrote C. A. (E.) Goodale as follows: "The officers of the Foothill Ditch Company have been informed that you are planning on pumping the water at some point near the river into the Foothill Ditch and conducting it down that ditch to your lands. Of course, you understand that you have a right to convey three cubic feet of water per second through the ditch and the officers of the company are wondering whether or not you are proposing to use the ditch in excess of that right. They will not want you to do so without first seeing Mr. Merryman and making some arrangement with him in regard thereto."

The Watson Ditch Company filed an action against J. W. C. Pogue, the Kaweah Power & Water Company, Cora Wallace Morton, and J. H. Morton. The answer of J. W. C. Pogue contains the following concerning his change of the heading and the ditch in 1890 and the rights of Cora Wallace Morton therein: "That in the month of January 1890 certain parties, unknown to this defendant at that time, and while this defendant was absent from his land and premises, unlawfully and without the knowledge of this defendant entered upon said dam and placed therein a large quantity of giant powder and exploded the same in said dam, and thereby blew a portion of said dam out of said river, and, as this defendant is informed and believes, left a large charge of giant powder in said dam, which charge so left in said dam was not exploded. That by reason of the fact that said charge of giant powder was left in said dam unexploded this defendant and his associates on account of fear of bodily injury resulting to them from the explosion of said charge of giant powder, left in said dam as aforesaid, refrained from rebuilding said dam where the same was originally placed, but thereupon changed the head of said Pogue, Wallace and Crocker Ditch to a point on the channel of said Kaweah River about one hundred yards below where the said dam was formerly located, and thereupon cut a ditch from the channel of said river for a distance of two hundred feet * * *; that said ditch two hundred feet in length led and leads into the south or original channel of said Kaweah River, and the water so diverted into said south or original channel of said river flowed, and flows down to a point about four hundred yards from the point where said ditch entered said original or south channel of the Kaweah River; that thereupon this defendant dug and constructed a ditch leading from said lower point in said original or south channel of said Kaweah River in a southwesterly direction for a distance of about a half a mile which said last named ditch was connected with the channel of said Pogue, Wallace and Crocker Ditch at a point about three quarters of a mile below the original head of said Pogue, Wallace and Crocker Ditch as the same was enlarged by this defendant and his said associates in 1875 as aforesaid; that from

the month of January, 1890, until the month of May, 1890, the head of said Pogue, Wallace and Crocker Ditch, as the same was changed in the month of January, 1890, diverted and carried away from the channel of said Kaweah River water sufficient to fill said Pogue, Wallace and Crocker Ditch without the aid of a dam at the head of said ditch; that in the month of May, 1890, this defendant peaceably, openly, notoriously and adversely under a claim of right against said plaintiff (Watson Ditch Company) and its predecessors, so to do, placed a dam in the channel of said Kaweah River at the head of said Pogue, Wallace and Crocker Ditch, which said dam was placed about one hundred yards below the first and original dam hereinbefore referred to, and also at the time last stated this defendant peaceably, openly, notoriously and adversely under a claim of right against said plaintiff and its predecessors, so to do, placed a dam in the original or south channel of said Kaweah River at the point where said new ditch was constructed and led out from said original or south channel down to the original channel of said Pogue, Wallace and Crocker Ditch, and by means of said two dams, hereinbefore referred to and the ditches leading into and from said original or south channel of said river, this defendant has, ever since the month of May, 1890 to a short time immediately prior to the 20th day of September 1899 diverted and carried away from the channel of said Kaweah River a stream of water. * * * And this defendant further alleges that Cora Wallace Morton, the wife of J. H. Morton, is the successor in estate of this defendant's said associate W. H. Wallace, and as such she is the owner of an undivided third of said ditch, and for more than five years prior to the 20th day of September 1899 her predecessors, and she as their successor in estate, were in the occupation and use of said ditch as a tenant in common thereof, and by means of said dams and ditch diverted water from said Kaweah River and used said water so diverted upon a portion of the lands first hereinbefore described, continuously and uninterruptedly, and, as this defendant is informed and believes, adversely and under a claim of right against said plaintiff (Watson Ditch Company) and its predecessors, and with knowledge and acquiescence of said plaintiff and its predecessors."

[1] From this statement of facts it appears that many years ago the original head of the Pogue, Wallace, and Crocker Ditch was abandoned, and that by agreement the diversion point was changed. Thereafter, over a period of years, the line of the ditch was straightened, flumes constructed, and the old ditch abandoned. However, we are of the opinion that the recited evidence clearly shows that since 1883, and until 1928, defendant and its predecessors in interest by their actions, by their respective deeds, and by declarations in various pleadings, have at all times recognized that plaintiff and its predecessors in interest had an easement in the new ditch. Throughout the years the change in the course of the ditch has never been regarded by either the plaintiff or the defendant, or by any of their respective predecessors, as altering the rights of either party in the ditch, as fixed by the 1883 partition decree. The law is clear that the mere relocation by mutual consent of a right of way or other easement does not alter the rights of the owner of the easement. Vargas v. Maderos, 191 Cal. 1, 214 P. 849; Cox v. Blaydes, 246 Ky. 121, 54 S.W.(2d) 622; Davis v. Wilkinson, 140 Va. 672, 125 S.E. 700; Berkey & Gay Furniture Co. v. Valley City Milling Co., 194 Mich. 234, 160 N.W. 648. The trial court specifically and at length found the necessary facts to support this view. If these were the only findings, there could be no doubt of the correctness of the judgment based thereon. But the trial court also found that in 1906 the Watson Ditch Company brought an action in which the predecessors of both plaintiff and defendant were named as defendants; that that action involved, among other things, the right of plaintiff and defendant here to divert water through the Foothill ditch; that in that case judgment was entered pursuant to a stipulation signed by the predecessors of the plaintiff and defendant in the instant case. After making these findings, the trial court in this case then incorporated by reference in its findings the judgment and the stipulation upon which it was based in the Watson Ditch Company Case "as fully and to the same effect as though the same were herein set out in full." In the judgment in the Watson Ditch Company Case, thus incorporated into the findings in this case, appears the following:

"Now the Court being advised in the premises it is ordered, adjudged and decreed, and it is the judgment of this Court, that the said defendant, J. W. C. Pogue, is the owner of that certain water ditch described in his answer, and called Pogue's Lower Ditch, and which leads out of the channel of the Kaweah River referred to in the pleadings in this case at a point on the Southeast Quarter of Section Twenty-six in Township Seventeen South, Range Twenty-seven East, of the Mount Diablo Base and Meridian, distant about one hundred yards below the head of what is referred to in said defendant Pogue's Answer as the original head of the Pogue, Wallace and Crocker Ditch; * * * that said defendant J. W. C. Pogue is also the owner of an undivided two-thirds of that certain ditch described as the Pogue, Wallace and Crocker Ditch described in the pleadings in this case from the head of said ditch, where the same connects with the said Kaweah River down to and through the lands of said defendant Cora Wallace Morton, described in the answer of said defendant Cora Wallace Morton; * * * that said defendant Cora Wallace Morton is the owner of the undivided one-third of that certain ditch described in the pleadings in this case as the Pogue, Wallace and Crocker Ditch, from the head thereof where it connects with the channel of said Kaweah River, down to and through the lands of said defendant Cora Wallace Morton described in the answer of said defendant Cora Wallace Morton in this case; that said defendant, Cora Wallace Morton, has the prior and superior right, as against the said plaintiff, (Watson Ditch Company) to divert and carry away from said river at all times three cubic feet of water per second by means of the said Pogue, Wallace and Crocker Ditch or by any other ditch or means which she may provide."

Defendant contends that these findings are wholly inconsistent with and contradictory to the findings quoted earlier in this opinion to the effect that the new ditch constructed by Pogue and his successors was but a relocation of the old Pogue, Wallace, and Crocker ditch. It is contended that by incorporating the judgment and stipulation in the Watson Ditch Company Case into its findings in this case the trial court has found that the new ditch, or so much of it as had been constructed in 1906, was the exclusive property of Pogue; that plaintiff's and defendant's predecessors had a one-third and two-thirds interest, respectively, in the old ditch; that there were two separate ditches; and that plaintiff and its predecessors had no interest in the new ditch.

[2-4] It cannot be doubted that the incorporation of the stipulation and judgment, as above recited, had the effect of making the recitals of the stipulation and judgment in the Watson Ditch Company Case findings of fact in the instant case. It also cannot be doubted that portions of the judgment in the Watson Ditch Company Case are contradictory to and inconsistent with the particular findings that plaintiff has an easement in the Foothill ditch. Plaintiff presents a lengthy argument by which it is attempted to reconcile these findings, but we are of the opinion that the findings cannot be reconciled. However, as already stated, the evidence, although conflicting, overwhelmingly supports the findings that the new ditch is but a relocation of the old. That this was the view of the trial court is evidenced by the fact that the judgment is based on these findings. It was formerly the rule in this state that where two findings on an essential fact are conflicting, neither can be relied upon to support the judgment. Moody v. Newmark & Edwards, 121 Cal. 446, 53 P. 944; Fanta v. Maddex, 80 Cal.App. 513, 252 P. 630. It is also well settled, however, that when a general finding conflicts with a special finding, the latter controls. 24 Cal.Jur. 974, § 206, and cases cited. Moreover, we are further of the opinion that under the power conferred on appellate courts by the addition of section 956a to the Code of Civil Procedure in 1927, appellate courts, where justice requires it, have the power, when findings are conflicting, to disregard one of the findings and to affirm the judgment, in order that, to use the express language of the section, "wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." Acting pursuant to that power, we therefore order stricken from the findings those portions of the stipulation and judgment in the Watson Ditch Company Case in conflict with the specific findings above quoted.

[5] The second point raised by defendant is that certain portions of the findings

and judgment are in conflict with certain orders of the railroad commission. The trial court found "that the only obligation, debt or liability which may accrue or arise by reason of plaintiff's exercising its rights hereinabove described and by reason of plaintiff's conducting and transporting its said three (3) cubic feet of water per second through the said ditch, is an obligation and liability to contribute toward its share of the cost and maintenance and cleaning of the said portion of the ditch in which and through which plaintiff's easement and right of way extends; that plaintiff has for a long period of time acquiesced in the payment of the sum of one hundred fifty ($150.00) dollars per year as plaintiff's share of the cost of cleaning and maintenance of the above described portions of the said ditch; that the payment of the said sum of one hundred fifty ($150.00) dollars per year is not and cannot be made a condition precedent to the exercise by plaintiff of its right to conduct or transport its said three (3) cubic feet of water per second through the said ditch." The court also found: "that said rights of plaintiff to divert three cubic feet of water per second from the Kaweah River into and through said Foothill Ditch is now, and has been a vested right and easement existing for more than ten years prior to the year 1915, and plaintiff has not, nor has any of its stockholders ever acquiesced in any jurisdiction of the Railroad Commission of the State of California over any interest, right or estate which plaintiff has therein, as hereinbefore set forth, and that the Railroad Commission of the State of California has no jurisdiction, right, or authority to change, affect or modify any of the rights that plaintiff has as hereinabove in these findings set forth." The judgment provides in part "that the only obligation, debt or liability which may accrue, or which can accrue by reason of plaintiff's exercising its right as described in this judgment is an obligation and a liability to contribute toward the cost of maintenance and cleaning of the portion of said Foothill Ditch over and through which plaintiff's said right of way and easement exists; that defendant has, for a long period of time acquiesced in the payment of the sum of $150.00 per year as plaintiff's proportionate share of the costs of cleaning and maintenance of the said portion of the Foothill Ditch, and that defendant has for the said long period of time acquiesced in taking and receiving said sum of One Hundred Fifty ($150.00) Dollars a year as plaintiff's approximate share of the cost of cleaning and maintenance of the above described portion of the said ditch; that the payment of the said sum of One Hundred Fifty ($150.00) Dollars per year is not and cannot be made a condition precedent to the exercise by plaintiff of any of the said rights of plaintiff or in the use by plaintiff of the said easement."

In the record it appears that in 1915 the defendant applied to the Railroad Commission for permission to increase its rates to consumers. In the order and decision of the commission, it is stated: "There is one user of water, namely, C. E. Goodale, of the Wallace ranch, who transports water through the ditch of the Foothill Ditch Company from the Kaweah River to his ranch, some three miles from the intake. For this service he pays nothing at present. Mr. Goodale has an adjudicated right to divert three cubic feet per second from the water of the Kaweah River and owns a third interest in the ditch from his ranch to the intake. I am of the opinion that Mr. Goodale should bear his proportional part of the expense of maintaining and operating the ditch. I will therefore recommend that a rate of 12 cents for one miner's inch (1/50 second foot) for twenty-four hours for water used for the irrigation purposes, and a charge of $5.00 per second foot per month for water transported to what is known as the Wallace ranch, be established."

It further appears that in 1921 the defendant again applied for permission to raise its rates. The 1921 order and decision of the commission recites that "a public hearing was held at Exeter, of which all interested parties were notified, and given an opportunity to be present and heard." By this 1921 order the commission raised the rates to consumers of the utility and also raised the rate for the Wallace ranch to $6 per second foot month. Both the 1915 and 1921 orders were properly admitted into evidence. The uncontradicted evidence shows that for many years all costs of operation and maintenance of the ditch have been paid by the defendant, except that after the 1915 order of the commission the plaintiff, as a result of an agreement with defendant, has paid the latter $150 a year as its

share of maintenance cost. It is conceded that plaintiff has at no time paid the rates fixed by the commission.

There is one other order of the commission discussed in the briefs, to which reference should be made. This order appears in 33 Opinions and Orders of the Railroad Commission 237, and is entitled "In the Matter of the Application of Foothill Ditch Company, a Corporation, to Increase Rates for Water Supply." The decision is dated June 18, 1929. From the opinion, it appears that in 1928 the commission had increased defendant's rates as they applied to plaintiff, and that plaintiff had petitioned for a rehearing on the ground of lack of notice. The rehearing was granted and this opinion filed. This opinion recites in detail the controversy over the ownership of the Foothill ditch and over plaintiff's claims therein, and specifically holds that that question should not be decided by the commission, but by the courts. The opinion holds, however, that since the evidence in that proceeding shows (as does the evidence in the present case) that the utility is furnishing plaintiff a service, the commission has the power to fix rates for that service, whether plaintiff owns a part of the ditch or an easement therein or not. The commission thereupon fixed a rate applicable to the consumers of defendant, including plaintiff, of 14 cents for one miner's inch day of 24 hours. This order and decision was not offered or received into evidence in the present case. Plaintiff contends that under the authority of Mound Water Co. v. Southern California Edison Co., 184 Cal. 602, 194 P. 1014, this court cannot take judicial notice of the above-mentioned order of the commission. Assuming that the plaintiff is correct and that this court cannot take judicial notice of the 1929 order above referred to, it still affirmatively appears from the record that the commission, with full knowledge of the claimed rights of plaintiff, has made at least two orders fixing rates for the service rendered plaintiff by defendant. It does not appear that these orders are void on the face thereof. Under such circumstances, the trial court had no jurisdiction directly or indirectly to overrule an order of the Railroad Commission. The power to reverse, review, correct, or annul orders of that commission rests solely in the Supreme Court (section 67 of the Public Utilities Act, supra), and the superior court is without jurisdiction in the premises. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.(N.S.) 652, Ann.Cas. 1915C, 822; Truck Owners & Shippers, Inc., v. Superior Court, 194 Cal. 146, 228 P. 19; Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249; People v. Hadley, 66 Cal.App. 370, 226 P. 836. It is clear, therefore, that those portions of the findings, conclusions, and judgment that purport to fix the rate to be paid by plaintiff to defendant for the service rendered, and that purport to find that the commission was without jurisdiction should be stricken.

[6] The third assignment of error has to do with the failure of the trial court to fix the right of defendant to divert six cubic feet per second through the Foothill ditch as being equal with the right of plaintiff to divert three cubic feet per second through that ditch. An examination of the record indicates that it is admitted in the pleadings and in the briefs, and established by uncontradicted evidence, that the right of plaintiff to divert its three cubic feet per second through the ditch is an equal and not superior right to that of defendant to divert six cubic feet per second through the ditch. The two rights find their admitted source in the right of Pogue, Wallace, and Crocker, as tenants in common, to divert nine cubic feet per second through the ditch. The tenancy in common was broken by the partition decree of 1883 and the land and water rights divided, but neither party nor its predecessors was then given, nor has it since acquired, a superior right over the other so far as water rights are concerned.

The judgment in the present case recognizes the right of plaintiff to divert three cubic feet per second through the ditch, and, by the judgment, the defendant is enjoined from interfering in any way with that right. The probable effect of such a judgment is to make the right of plaintiff superior to that of defendant, when there are not nine cubic feet of water per second in the river, a condition which the evidence indicates has occasionally arisen. Under such circumstances, the trial court should have found that the rights of plaintiff and defendant to their three and six cubic feet of water, respectively, per second are equal and not superior one to the other, and the judgment should also so

have provided. It should also have been found and made part of the judgment that, when there is a shortage of water, so that each party cannot obtain its full supply, the deficiency should be borne proportionately by the parties. Under section 956a of the Code of Civil Procedure, this court has the power to make new and additional findings in such a case, to modify the judgment, and to affirm the judgment, as so modified.

From the foregoing, it is obvious that by a modification of the judgment and by striking out or adding to the findings, as above indicated, this controversy can be finally settled on this appeal, and that the interests of justice do not require a new trial.

It is therefore ordered:

1. That those findings and conclusions of the trial court inconsistent with and contradictory to those findings and conclusions to the effect that the Foothill ditch is a relocation of the old Pogue, Wallace, and Crocker ditch, and to the effect that plaintiff has an easement in the Foothill ditch, are hereby stricken from the findings and conclusions.

2. Those portions of the findings, conclusions, and judgment that purport to fix the rate to be paid by plaintiff to defendant for the service rendered and that purport to hold that the Railroad Commission was without jurisdiction to fix the rate, are stricken.

3. The findings, conclusions, and judgment are hereby modified to provide that the right of plaintiff to divert its three cubic feet per second is equal and not superior to the right of defendant to divert its six cubic feet of water per second through the Foothill ditch; and it is further made part of the judgment herein that when there is a shortage of water so that plaintiff and defendant cannot each obtain its full supply, the deficiency must be borne ⅓ by plaintiff and ⅔ by defendant.

As so modified, the judgment is affirmed, both parties to bear their own costs on this appeal.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

5 Cal.2d 154

INGELS, Director of Motor Vehicles, v. RILEY, State Controller.

S. F. 15596.

Supreme Court of California.

Jan. 14, 1936.

1. Licenses ⇐1
Taxation ⇐1

Generally, "property tax" is for revenue and does not impose restriction upon use of property taxed, while "privilege tax," although also for revenue, and distinguishable from "license tax," is imposed upon right to exercise privilege, and its payment is made a condition precedent to exercise of privilege involved.

[Ed. Note.—For other definitions of "License Tax," "Privilege Tax" and "Property Tax," see Words & Phrases.]

2. Taxation ⇐1

Character of tax must be ascertained by its incidents and from natural and legal effect of language employed in taxing statute.

3. Licenses ⇐1

In determining nature of tax, mode of ascertaining amount thereof is not conclusive, and privilege tax does not become property tax simply because it is proportioned in amount to value of property used in connection with privilege which is taxed.

4. Taxation ⇐1

In determining nature of tax, designation made by Legislature must be given consideration, although not conclusive on courts.

5. Automobiles ⇐21
Taxation ⇐219

Statute imposing annual tax on automobiles used on public highways based on value of automobile and designated as license fee in taxing statute *held* to impose "excise tax" on privilege of operating automobile on highways and not "property tax," and hence veterans were not exempt from payment thereof under constitutional exemption from payment of property tax (St.1935, p. 108, §§ 141, 142; pp. 1312, 1313, §§ 1–5; Const. art. 13, § 1¼).

[Ed. Note.—For other definitions of "Excise," see Words & Phrases.]

6. Licenses ⇐5

Constitutional provision authorizing state to levy property taxes *held* not to deny Legislature power to levy privilege tax for revenue purposes (Const. art. 13, § 14, as amended in 1933).

7. Constitutional law ⇐68(4)

Legislature is vested with all governmental powers in matters of regulation and reve-

nue not reserved to federal government or denied to state Legislature by State or Federal Constitution.

8. Statutes ⇐64(8)

Validity of statute imposing license tax on privilege of using automobiles on public highways would not be affected by invalidity of provision exempting from local taxation automobiles upon which license tax was paid, in view of saving clause of statute (St.1935, p. 108, §§ 141, 142; pp. 1313, 1315, §§ 5, 9; Const. art. 13, § 14, as amended in 1933).

9. Licenses ⇐5

That state has imposed one excise does not prevent imposition of another excise upon same privilege for same period.

10. Automobiles ⇐24

Constitutional requirement that taxation must be in proportion to value *held* applicable only to property taxes and does not affect power of Legislature to impose double license tax on operation of automobiles on public highways, since such constitutional provision applies only to property taxes (St. 1935, p. 108, §§ 141, 142; p. 147, § 370; p. 1312, § 1 et seq.; Const. art. 13, § 1).

11. Automobiles ⇐28

Motor Vehicle License Fee Act *held* not invalid as imposing double taxation on the same privilege in that the Vehicle Code imposes upon all motor vehicle operators an annual fee, since the two acts, when read together, impose but one excise tax upon privilege of operating motor vehicles on a state highway (St.1935, p. 108, §§ 141, 142; p. 147, § 370; p. 1312, § 1 et seq.).

In Bank.

Original proceeding for writ of mandate by Ray Ingels, as Director of Motor Vehicles of the State Department of Motor Vehicles, against Ray L. Riley, as State Controller.

Application for writ denied.

Harry Sherr, of Los Angeles, and Paul Mason, of Sacramento, for petitioner.

Thomas H. Christiansen, of Sacramento, for respondent.

Edward M. Berol and Marvin Handler, both of San Francisco, U. S. Webb, Atty. Gen., and Robert W. Harrison and James J. Arditto, Deputy Attys. Gen., amici curiæ.

Ivan Kelso, General Counsel, and J. Allen Davis, Associate Counsel for Automobile Club of Southern California, both of Los Angeles, and G. E. Sandford, General Attorney, California State Automobile Ass'n, of San Francisco, amici curiæ.

Harold P. Huls, City Atty., and John W. Holmes, Dep. City Atty., both of Pasadena, amici curiæ, for the City of Pasadena.

PER CURIAM.

Petition for a writ of mandate to compel respondent, as state controller, to issue his warrant to the state treasurer authorizing the latter to pay a printing claim incurred by petitioner as director of the department of motor vehicles. The purpose of the proceeding is to secure an interpretation and to test the constitutionality of the Motor Vehicle License Fee Act. St.1935, c. 362, p. 1312.

The precise problem involved arose under the following circumstances: By the terms of the act, the administration thereof is placed in petitioner's department. Petitioner interpreted the act as imposing a property tax on motor vehicles, and concluded that veterans who properly qualified under section 1¼ of article 13 of the Constitution are entitled to an exemption from the tax, as therein provided. To facilitate the handling of such exemption claims, petitioner ordered from the bureau of printing certain forms. A claim for such printing, in due form, regularly approved by petitioner, was, as required by law, presented to respondent for his warrant therefor upon the state treasurer. Respondent refused to draw his warrant on the ground that, in his opinion, the tax is not a property tax, but a privilege or license fee, and that veterans under the above constitutional provision are not entitled to an exemption from such a tax. He therefore took the position that the charge for the printing was illegal. The Attorney General, whose duty it is to advise both departments, confessed an inability to determine the nature of the tax, whereupon this proceeding was instituted. In addition to the parties to this proceeding, various amici curiæ, including representatives of the veterans, of the city of Pasadena, of the larger automobile clubs, and of others have appeared in the action.

As between petitioner and respondent, almost the sole point presented is whether the act imposes a property or a privilege tax. The determination of this question requires an analysis of the provisions of the act. Section 1 provides that the term "vehicle" means every vehicle subject to registration under the Vehicle Code. St.1935, c. 27, p. 93. Referring

to the Vehicle Code, it is provided in section 141 thereof that all motor vehicles, trailers, or semitrailers *when driven or moved upon the highways* be registered. Section 142 exempts nonresidents, dealers, and transporters, and certain other limited groups.

Section 2 of the Motor Vehicle License Fee Act provides: "A license fee is hereby imposed for the privilege of operating in this State any vehicle. The annual amount of such license fee shall be a sum equal to one and three-quarters per cent of the actual market value of such vehicle, as determined by the department. The department annually shall compile and publish a list showing the market values as determined by it of each class of vehicle subject to the license fee hereby imposed, such vehicles being classified by make, type and year of manufacture. The license fee imposed by this act shall not apply to any vehicle not subject to registration under the Vehicle Code, nor to any vehicle owned by the State, any political subdivision of the State, or any city, city and county, county, district or public corporation."

Section 3 provides that the license fee thus imposed shall be due and payable on January 1st of each year and shall be paid at the time of registration of the vehicle.

Section 4 provides that, when a car is first registered after the end of January, the fee shall be reduced by one-twelfth for each month that has elapsed since the first of the year.

Section 5 provides: "The license fee imposed under this act is in addition to any and all licenses and taxes otherwise imposed, except that no tax according to value shall hereafter be levied or imposed upon any vehicle upon which is paid the license fee required by this act. Such vehicles are hereby exempted from all taxes, State, county or municipal, according to value levied for State or local purposes."

Section 6 provides in part:

"Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to such fee shall be added thereto and be collected therewith.

"Every license fee and any penalty added thereto, from the date the same becomes due, constitute a lien upon the vehicle for which due."

The section further provides for the collection of the fee by seizure and sale of the vehicle under the same provisions providing for the seizure and sale by county assessors of personal property.

Sections 7 and 8 provide that the duty of collecting the tax is imposed on the motor vehicle department, and the sections confer upon the director of that department certain powers in connection therewith.

There are three sections entitled "Sec. 9." Section 9 first appearing provides that all moneys collected under the act shall be deposited to the credit of the motor vehicle license fee fund and shall be appropriated as follows:

(a) One per cent. for the use of the department of motor vehicles in the enforcement of the act.

(b) Twenty-five per cent. of the remainder to the cities of the state on a population basis. The section expressly provides: "The moneys so paid shall be expended by the cities and cities and counties for law enforcement and the regulation and control and fire protection of highway traffic."

(c) Twelve and one-half per cent. of the remainder to counties and cities on a population basis without restriction as to use.

(d) The balance of the fund shall be transferred to the general fund of the state and, out of such moneys, there shall be set aside a sufficient sum to pay the interest and principal on certain designated state highway bonds.

Section 9, second appearing, provides that the fee provided by the act shall not be imposed after December 31, 1937.

The third section 9 has the usual provision concerning the effect of declaring any section unconstitutional.

[1] We are first presented with the question as to the nature of the charge imposed by the above act. Is the charge provided therein a charge for the privilege of operating vehicles of the kind mentioned on the highways of the state, i. e., is the charge an excise or privilege tax? or is the charge in the nature of a tax on automobiles as personal property, i. e., a property tax? The distinction be-

tween a tax on a privilege and a property tax is many times a close one. Generally speaking, the function of a property tax is to raise revenue. Such a tax does not impose any condition nor does it place any restriction upon the use of the property taxed. A privilege tax, although also passed to raise revenue, and as such is to be distinguished from the license tax or regulatory charge imposed under the state's police powers, is imposed upon the right to exercise a privilege, and its payment is invariably made a condition precedent to the exercise of the privilege involved. 37 Cor.Jur. p. 171, § 9, and cases cited.

[2] It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents and from the natural and legal effect of the language employed in the statute. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 41 S.Ct. 272, 65 L.Ed. 638; In re Application of Schuler, 167 Cal. 282, 139 P. 685, Ann.Cas.1915C, 706.

[3] Applying these tests to the statute before us, we have no hesitancy in declaring that the charge involved is one imposed on the owners of motor vehicles for the privilege of using the highways of the state and is not, in nature, a property tax. Petitioner urges that it is a property tax, emphasizing that the basis of the tax is the value of the property involved, and that the act, by section 5, exempts such property from further taxation based on value. These considerations are of some importance in ascertaining the nature of the tax and, in some cases, have been held to be determinative. Vernor v. Secretary of State, 179 Mich. 157, 146 N.W. 338, Ann.Cas. 1915D, 128; Walker v. Bedford, 93 Colo. 400, 26 P.(2d) 1051. However, we are of the opinion that the better rule is that the mode of ascertaining the amount of the tax is not conclusive. We are of the opinion that, if a tax in its nature is a privilege tax, it does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed. State of Maine v. Grand Trunk Railway Co., 142 U.S. 217, 12 S.Ct. 121, 35 L.Ed. 994; Kane v. State, 81 N.J.Law, 594, 80 A. 453, L.R.A.1917B, 553, Ann.Cas.1912D, 237, affirmed 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222.

The rule that the mode of ascertainment is not conclusive has been expressly followed in this state. In the case of In re Application of Schuler, supra, there was involved the interpretation of the 1913 Motor Vehicle Act providing for the charging of a fee for the registration of vehicles, based on horse power. In holding that the charge there involved was a charge for the privilege of using the highways, this court relied upon, and quoted with approval, the following language from the leading case of Kane v. State, supra (167 Cal. 282, page 290, 139 P. 685, 689, Ann.Cas.1915C, 706): "The character of the imposition is not determined by the mode adopted in fixing its amount. Maine v. Grand Trunk Railway Company, 142 U.S. 217, 12 S.Ct. 121, 163, 35 L.Ed. 994." See, also, the advisory opinion of the Supreme Judicial Court of Massachusetts in Opinion of the Justices, 250 Mass. 591, 148 N.E. 889.

[4, 5] When the act is read as a whole, we are of the opinion that it must be denominated an excise tax, for revenue purposes, imposed upon the privilege of using the highways for the purpose of operating thereon registered motor vehicles. In the first place, the charge is designated as a privilege tax in the statute itself. Section 2, above quoted, provides that "a license fee is hereby imposed for the privilege of operating in this State any vehicle," etc. Subsequent sections clearly provide that the tax is payable only when the vehicle is operated on the highways of the state. Although the designation made by the Legislature is not conclusive on the courts, some weight must be given such designation in determining the nature of the tax. In San Francisco v. Liverpool, etc., Ins. Co., 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425, this court, in discussing the character of a tax, had recourse to this factor. In the Opinion of the Justices, supra, the Massachusetts court, in advising the Legislature of that state as to the nature of a proposed taxing statute on motor vehicles, based on value, identical in many respects with the one here involved, stated (250 Mass. 591, 148 N.E. 889, page 891): "Avowedly an excise tax is established. The declaration to that effect is explicit. Such statutory statement is

to be accepted as true unless incompatible with the meaning and effect of the act as a whole."

In Storaasli v. State of Minnesota, 283 U.S. 57, 51 S.Ct. 354, 355, 75 L.Ed. 839, the United States Supreme Court, in interpreting a statute almost identical with the one here involved, emphasized the fact that the Legislature had denominated the charge a privilege tax.

In addition to the characterization of the charge in the statute as a privilege tax, an examination of the terms of the act plainly indicates that the charge is an excise for the privilege of using the highways, and not a tax on motor vehicles as personal property. By sections 3 and 6, above summarized, the charge becomes due and payable only when the vehicle is operated on the highways of the state. Any vehicle used exclusively on private property, or that is kept in storage, is not subject to the charge. In such event, the motor vehicle is made subject to local ad valorem property taxes. In other words, it is only when the vehicle is used on the highways that the tax becomes payable. Under section 4, it is provided that, when a car is first registered during the year, the tax is reduced one-twelfth for each month that has elapsed from the first of the year. The obvious purpose of this provision is that the tax is proportioned according to the extent of the privilege enjoyed. This feature is seldom, if ever, found in a property tax.

By the weight of authority in other jurisdictions, such a tax has been held to be a privilege tax. The leading case is Storaasli v. State of Minnesota, supra, which involved, as already stated, the interpretation of a Minnesota statute almost identical with the one here under review. The Minnesota tax as measured by the cost of the car, less depreciation, was made in lieu of all other taxes thereon, except one specified municipal wheelage tax, and was imposed only on vehicles "using the public streets or highways." The petitioner was a resident of a military reservation under the control of the United States government. His car was registered and licensed under federal law and carried a federal license plate. He contended that the statute levied a property tax, in which event, of course, the property could not be taxed by the state. The state court had held (State v. Storaasli, 180 Minn. 241, 230 N.W. 572) that the tax was both a property and a privilege tax and that the character as a privilege tax extended to the whole tax, and that therefore it must be paid by petitioner. The United States Supreme Court held it would decide for itself the nature of the tax. It then held (283 U.S. 57, page 62, 51 S.Ct. 354, 355, 75 L.Ed. 839) that:

"We think it plain that the levy is an excise for the privilege of using the highways.

"It is denominated a privilege tax. The car cannot use the highways unless it is paid. The statute contains the usual provisions for registration, issuance, and display of number plates, etc. Residents of other states who desire to use the highways for more than the period specified in certain sections extending the privilege must register their vehicles and pay the same tax as residents of Minnesota. The claim that the state is attempting to tax appellant's property situate without its jurisdiction cannot be sustained."

The same result was reached by the Supreme Judicial Court of Massachusetts in its advisory opinion in Opinion of the Justices, 250 Mass. 591, 148 N.E. 889, above referred to, involving the interpretation of a proposed statute on motor vehicles, based on the value thereof. The court held that such a tax was nothing more than a toll for the privilege of operating motor vehicles on the highways, and was therefore a privilege tax. See, also, In re Application of Schuler, supra; Whaley v. Northern Road Imp. Dist., 152 Ark. 573, 240 S.W. 1, 24 A.L.R. 934; Smith v. Com., 175 Ky. 286, 194 S.W. 367; Jasnowski v. Board of Assessors of City of Detroit, 191 Mich. 287, 157 N.W. 891; State v. Becker, 288 Mo. 607, 233 S.W. 54; Northwest Auto Co. v. Hurlburt, 104 Or. 398, 207 P. 161; In re Hoffert, 34 S.D. 271, 148 N.W. 20, 52 L.R.A.(N.S.) 949.

For the foregoing reasons, we hold that the charge here involved is an excise tax, for revenue purposes, imposed upon the privilege of operating motor vehicles on the highways of this state, and that therefore veterans are not entitled to the exemption provided for by section 1¼ of article 13 of the Constitution; that section, by express language, exempting only persons therein mentioned from property taxes.

[6,7] This disposes of the main contention raised by petitioner. He and amici curiæ do urge that under section 14 of article 13 of the Constitution, as amended in 1933, the Legislature is empowered only to levy property taxes and is not authorized by that section, or any other section, to levy a privilege tax for revenue purposes. This contention is without merit. Assuming, without deciding, that section 14 of article 13 expressly confers power upon the state to levy property taxes only, we find nothing in that section, or in any other section of the State or Federal Constitutions, expressly or by implication denying to the Legislature the power to levy a privilege tax for revenue purposes. It is elementary that the Legislature is vested with all governmental powers in matters of regulation and revenue not reserved to the federal government or denied to the state Legislature by our own or the Federal Constitution. 5 Cal.Jur., p. 666, § 87.

[8] It is also urged that the Legislature, under section 14, article 13, has the power to exempt personal property from taxation only when the Legislature undertakes to levy a tax on personal property. The language of the section, so far as pertinent here, is as follows: "The Legislature shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, not exempt from taxation under the provisions of this Constitution, in such manner, and at such rates, as may be provided by law, and in pursuance of the exercise of such power the Legislature, two-thirds of all of the members elected to each of the two houses voting in favor thereof, may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property."

It is contended that the phrase "and in the pursuance of the exercise of such power" (the power to levy a tax on personal property) qualifies and limits the phrase "may exempt entirely from taxation any or all forms, types or classes of personal property," and that, since the present tax is not a property tax, no authority exists to exempt motor vehicles as personal property from local taxation. We do not find it proper to decide that point. If the exemption from local taxation found in section 5 is invalid, as beyond the legislative power, this would not render the act unconstitutional, but, under the saving clause in section 9, would simply invalidate that portion of section 5, and the rest of the statute would stand. Such an important question from the standpoint of local taxing authorities and all motor vehicle owners should not be decided in this proceeding, where it is not involved.

[9-11] It is also urged that the tax is unconstitutional, for the reason that, when read with the provisions of the Vehicle Code, supra, double taxation is imposed by the same taxing agency on the same privilege. It is contended that this violates the Constitution, although no provision of either the Federal or State Constitution is specifically referred to. This argument is based on the fact that the Vehicle Code, supra, section 370, imposes upon all motor vehicle operators, as defined in the act, an annual fee of $3. There is no merit in this contention. The mere fact that the state has imposed one excise under one act does not prevent the state from imposing another excise upon the same privilege for the same period. Article 13, section 1, of the State Constitution, has no application, because that section applies only to property taxes. In the second place, the Vehicle Code was passed by the same session of the Legislature that passed the License Fee Act. The latter constantly refers to and incorporates some of the provisions of the former. The two statutes are in pari materia, and, under accepted principles of law, should be read together. By so construing the two statutes, there is but one excise tax levied by the state upon the privilege of operating motor vehicles on the highways of this state. Part of this tax (that contained in the Vehicle Code) is a flat charge, while the other part (contained in the License Act) is based on value. The policy of thus using a double method of assessment is a matter well settled in the legislative discretion.

Amici curiæ have also raised other questions of interpretation and several other constitutional points, many of which are not now properly before us. The city

attorney of Pasadena, at great length, urges that the act is unconstitutional, in that by section 9 (b) thereof it purports to appropriate a portion of the funds collected to cities for what counsel term "municipal" purposes, in violation of article 11, section 12, of the Constitution, as amended in 1933, and cites such cases as Ex parte Jackson, 143 Cal. 564, 77 P. 457; People v. Martin, 60 Cal. 153; San Francisco v. Liverpool, etc., Ins. Co., 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425, and others. This point cannot be determined in this proceeding, for the obvious reason that, even if section 9 (b) of the act did violate the constitutional provision referred to, a point we expressly refrain from deciding, such invalidity would not affect the other provisions of the act. This was precisely the ruling in Re Application of Schuler, supra, where exactly the same problem was presented. The other contentions made do not warrant further discussion.

The application for the writ is denied.

5 Cal.2d 224

Ex parte BRADY.

Cr. 3976.

Supreme Court of California.

Jan. 27, 1936.

1. Criminal law ⇐1218

Imprisonment in men's state reformatory constituted serving of term in "state prison" within habitual criminal statute (Pen.Code, § 644).

[Ed. Note.—For other definitions of "State Prison," see Words & Phrases.]

2. Criminal law ⇐1202(1)

That felony for which prisoner was convicted was committed while prisoner was on parole from state prison, where he had been for the third time imprisoned for commission of felonies, did not affect right to sentence prisoner as an habitual criminal (Pen.Code, § 644).

3. Criminal law ⇐1202(1)

One who has been sentenced for commission of felony but is granted probation has not served a "term" in prison for the offense as contemplated by habitual criminal statute (Pen.Code, § 644).

[Ed. Note.—For other definitions of "Term," see Words & Phrases.]

4. Habeas corpus ⇐50

Prisoner who had been convicted on felony charges three times prior to conviction for which he received life sentence, but, because he had been granted probation for one offense, had served only two prior convictions within habitual criminal statute, *held* not entitled to habeas corpus, since he would be eligible for parole only after serving 12 years (Pen.Code, § 644).

In Bank.

Petition by James R. Brady for a writ of habeas corpus.

Petition denied.

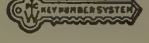
James R. Brady, in pro. per.

PER CURIAM.

[1-4] The petitioner was convicted in Tulare county of grand theft with three prior convictions and sentenced to be imprisoned for the term of his natural life. He claims to be illegally deprived of his liberty and in support thereof contends that the prior convictions, for one reason or another, are not such as are contemplated by section 644 of the Penal Code. We entertain no doubt that his conviction of breaking and entering as defined by the statutes of Nebraska comes within the offense of burglary mentioned in section 644, nor do we doubt that imprisonment in the men's state reformatory, as alleged in the petition, constitutes the "serving of a term" in a state prison within the meaning of that section. The conviction of grand theft, which is the third prior felony of which petitioner was found to be guilty, is one of the offenses enumerated by the section, and we think it can make no difference in the result that the last crime was committed while petitioner was on parole from the state prison at Folsom where he had been imprisoned for this offense. In our opinion he had served a term for the offense for which he was on parole which would have been the entire prison term had he not violated the parole. He avers that for the second offense, that of issuing a check without sufficient funds, he was granted probation, for which reason it cannot be counted as a prior conviction so as to deprive him of the possibility of parole. Assuming that the facts of record are in accordance with the averments, it must be conceded that pe-

titioner has never served a term for this offense as required by section 644 of the Penal Code. Therefore he has only suffered two prior convictions within the meaning of section 644. However, under this section one convicted of a felony who has previously been twice convicted of one of the enumerated felonies must be adjudged an habitual criminal and sentenced for life but is eligible for parole after serving a minimum of twelve years. Inasmuch as petitioner has suffered two prior convictions, he is not illegally confined and the petition should be denied.

Petition for writ of habeas corpus denied.



5 Cal.2d 200

BOLDEMANN CHOCOLATE CO. v. PRICE et al.

S. F. 15307.

Supreme Court of California.

Jan. 23, 1936.

1. Quieting title ⇐49

Complaint containing, in addition to usual averments of quiet title action, allegation setting forth circumstances surrounding issuance and assignment of policy together with prayer for determination of plaintiff's rights under policy, its title thereto, and ownership thereof, *held* sufficiently broad to authorize judgment quieting plaintiff's title and decreeing its right to immediate possession (Code Civ.Proc. § 580).

2. Insurance ⇐204

Where corporation adopted resolution authorizing its president to obtain policy on his life naming corporation, which was to pay all premiums, as beneficiary, and president made purchase for corporation, he could not thereafter assign policy in trust for stockholders (Civ.Code, §§ 2224, 2280, 2763).

3. Quieting title ⇐49

Where president of corporation acting under resolution of corporation purchased policy on his life for corporation's benefit and thereafter unauthorizedly attempted to assign policy in trust for stockholders, failure of judgment declaring that corporation was exclusive owner of property, to compel trustee to convey policy to corporation, *held* not prejudicial to stockholders' rights.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Boldemann Chocolate Company against Eva Price and another. From an adverse judgment, defendants appealed, but only the named defendant pursued the appeal by filing briefs.

Affirmed.

See, also (Cal.Sup.) 43 P.(2d) 810.

Gerald C. Halsey, Frederic T. Leo, and Halsey & Leo, all of San Francisco, for appellant Eva Price.

Pillsbury, Madison & Sutro, of San Francisco, for appellant Bank of California.

Phillip Barnett, of San Francisco (Samuel Vartan, of San Francisco, of counsel), for respondent.

CONREY, Justice.

Appeal by defendants from judgment for plaintiff in an action described as an action to quiet title to a life insurance policy. The complaint, however, in addition to the usual allegations of a complaint to quiet title, set forth the facts upon which plaintiff rested its claim, and asked for a determination of its rights in the premises.

The facts are not in dispute. Plaintiff, Boldemann Chocolate Company, a California corporation, has for many years been the channel through which its president, Oscar Boldemann, and members of the Boldemann family have conducted the business of manufacture and sale of chocolate confections. On February 12, 1922, the board of directors of the corporation, representing a majority of the issued shares of stock thereof, duly passed a resolution shown by its minutes, as follows: "Upon motion duly made, seconded and carried, it was decided that the life of Oscar Boldemann be insured for $50,000, and that this corporation be the beneficiary and pay all premiums. The above resolution was unanimously adopted. Oscar Boldemann was to attend to the details. * * *"

Thereafter, in accordance with said resolution, Oscar Boldemann purchased a $50,000 life insurance policy of the Prudential Insurance Company of America, dated May 20, 1922. In his original application he requested that the corporation be made beneficiary but, on suggestion of the in-

surance agent that he name his estate and thereafter assign the policy to the corporation, the policy was issued naming as beneficiary "the executors, administrators or assigns of the insured," with right reserved to change the beneficiary. On June 28, 1922, Boldemann executed a declaration of trust, transferring the policy to defendant bank, as trustee, with instructions to collect, upon his death, all sums due under it and "to distribute such sums to the stockholders" of the company in proportion as their holding might appear at said time on the company's books. From date of issuance of the policy each and every premium due thereon, about $2,000 annually, was paid by the corporation and the value of the policy was carried as an asset on its books.

In 1932, in the course of refinancing, the corporation attempted to borrow on the policy, and then discovered that by reason of the trust assignment to defendant bank for the benefit of the stockholders directly instead of for the corporation, a cloud existed upon its ownership of the policy. Under section 2280, Civil Code (prior to 1931 amendment, St. 1931, p. 1955), a trust such as this one purported to be could not be revoked "except by the consent of all the beneficiaries." The corporation, therefore, immediately sought the consent of the stockholders to cancellation of the trust, and obtained such consent from all stockholders save Eva Price, defendant herein, who owned less than 10 per cent. of the outstanding stock. This refusal of Eva Price to file her consent led to the bringing of this action.

Separate answers were filed by the defendants and on the issues so joined the cause went to trial. The court found that plaintiff was at all times the sole and exclusive owner of the policy and that its delivery in trust to defendant bank was without authority from plaintiff to Oscar Boldemann, "so that said policy was not at the time of delivery, is not now, and never was, subject to said trust, either as the corpus thereof or otherwise." Judgment followed quieting plaintiff's title to the policy and decreeing its right to immediate possession and custody thereof. Both defendants appealed, but only defendant Eva Price has pursued the appeal by filing of briefs.

No contention is made questioning the insurable interest of plaintiff in the life of Oscar Boldemann, and we have no misgivings on that score. Civ. Code, § 2763, 75 A.L.R. 1362, note.

[1] Disposing first of appellant's contention that this is a proper case for operation of the general doctrine that by the usual quiet title suit the owner of an equitable title to property cannot maintain an action against the owner of the legal title, we need only observe that the complaint herein contained, in addition to the usual averments of an action to quiet title, allegations setting forth the circumstances surrounding the issuance and assignment of the policy, together with a prayer for determination of plaintiff's rights under said policy, its title thereto, ownership thereof, and for a decree directing delivery of the policy to it, and for general relief. Under the pleadings so broadened the relief granted by the court was consistent with the case made by the complaint and embraced within the issues. Section 580, Code Civ. Proc.

[2] Appellant urges that the record shows that Oscar Boldemann never acted upon the authority conferred by the resolution of the corporation, but instead abandoned that authority and proceeded upon a new and different venture of his own, to wit, the purchase of a policy by himself and the creation of a binding, valid, irrevocable trust assigning the proceeds thereof for the benefit of the stockholders; hence that the policy was placed effectually beyond the reach of the corporation and that its only right in the premises is an action against Oscar Boldemann for damages for failure to carry out the corporate will, or for the return of the premiums improperly caused by Boldemann to be paid upon said policy, or both. This is not a correct analysis of the case. The record shows clearly that in purchasing the policy Oscar Boldemann acted pursuant to the resolution and made the purchase for and on behalf of the corporation. He was thereafter without authority to assign the policy in trust for benefit of the stockholders, and said assignment never created a valid and subsisting trust. In other words, the case is like any other case where a principal authorizes his agent to use the principal's money for purchase of certain personal property and the agent, instead of making the purchase in the name of his principal, makes it in his own name and later assigns it, without consideration, in trust for the benefit of others. In such case it is plain that

the unauthorized trust would be invalid and the principal could maintain a suit to establish his ownership of the property.

Section 2224 of the Civil Code provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." This doctrine has been applied in numerous instances, and to a great variety of facts. Although we find no case similar in point of fact to the case at bar, we do find abundant authority for the application here made of the rule. 25 Cal.Jur. pp. 146, 147, and cases in note.

[3] Ordinarily in such case the decree would declare and establish a trust and compel the trustee to convey the property to the person entitled thereto. But this is a mere procedural item. In this case the decision and judgment accomplished the same result by the direct declaration that plaintiff is the sole and exclusive owner of the policy. Under the circumstances shown by the record there does not appear to be any compelling reason to require the added ceremony of assigning the policy to plaintiff in order to give effect to the judgment. The omission of this step in the enforcement of the remedy causes no injury or prejudice to any rights of the defendant.

In support of respondent's contention that the facts establish its position as owner of the policy, it cites numerous cases, such as Wellhouse v. United Paper Co. (C.C.A.) 29 F.(2d) 886, 887, and Williamson v. Williamson Paint Mfg. Co., 113 W.Va. 744, 169 S.E. 408. Appellant in reply points to the fact that in those cases the policy named the plaintiff as beneficiary, and the question at issue related to the attempt of the nominal insured to change the beneficiary. Nevertheless, we think that the principles affirmed in those decisions should control in this case. Thus, in the Wellhouse Case, the court said: "In obtaining the policy the insured acted, not for himself individually, but for the paper company, which paid for the insurance. The insurance having been acquired at the expense and for the benefit of the paper company, that company was the owner of the policy and the beneficiary of its provisions, including the one as to changing the beneficiary. Whatever rights or privileges the insured had under the terms of the policy, he held in trust for the party from whom the consideration proceeded. Smithsonian Institution v. Meech, 169 U.S. 398, 407, 18 S.Ct. 396, 42 L.Ed. 793; Rothwell v. Dewees, 2 Black, 613, 17 L.Ed. 309; 26 R.C.L. 1219. The policy as a whole was an asset of the paper company."

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 46

GERBERICH et al. v. SOUTHERN CALIFORNIA EDISON CO., Limited.

L. A. 14528.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Jan. 30, 1936.

1. Trial ⇐178

Directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support a verdict for plaintiff.

2. Electricity ⇐19(6)

Where automobile guest was killed when automobile collided with pole located on dirt portion of highway under franchise providing that location of pole should not interfere with use of highway for travel, whether pole was being negligently maintained at time of accident *held* for jury, in suit against owner of pole for death of guest.

3. Electricity ⇐19(6)

Where automobile guest was killed when automobile collided with pole located on dirt portion of forty-foot highway when driver in nighttime attempted to pass preceding automobile, whether driver was negligent and whether such negligence was proximate cause of accident *held* for jury, in suit against owner of pole for death of automobile guest.

4. Negligence ⇐61(2)

Where original negligence continues and exists up to time of injury, concurrent negli-

gent act of third person causing injury will not be regarded as an independent act of negligence, but two concurring acts of negligence will be held to be proximate cause of injury.

5. Electricity ⇐16(1)

Although pole maintained beside highway by virtue of franchise could not be a nuisance, if pole might endanger traffic if maintained without warning signs or lights, finding of negligence would be warranted if danger could be avoided by exercise of ordinary care.

THOMPSON and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Suit by George C. Gerberich and others against the Southern California Edison Company, Limited. From a judgment for defendant, plaintiffs appeal.

Reversed.

Prior opinion, 43 P.(2d) 359.

Rehearing denied; SHENK, THOMPSON, and CONREY, JJ., dissenting.

Harold A. Jones and Leonard E. Thomas, both of Los Angeles, for appellants.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for respondent.

Thos. J. Straub and W. H. Spaulding, both of San Francisco, amici curiæ.

PER CURIAM.

A hearing was granted in this case in order to give further consideration to the contention of defendant that it could not be deemed negligent in maintaining its power pole in a location approved by public authority. We are now satisfied with the conclusion reached by the District Court of Appeal, and hereby adopt the following opinion of Mr. Justice Scott pro tempore as part of the opinion of this court:

Plaintiffs sued to recover damages for alleged wrongful death of their daughter. At conclusion of the testimony the trial court directed the jury to return a verdict in favor of defendant, and from judgment entered thereon plaintiffs appeal.

At about 9:30 o'clock on a Sunday evening in midsummer deceased was riding with a young man in the rumble seat of an automobile driven by one Renne. The party consisted of two couples from seventeen to nineteen years of age, on their way to the beach. They proceeded south on Alameda street to a point opposite the intersection of Gage avenue (which latter street was not cut through on the west side of Alameda where the accident occurred), and there collided with a pole erected and maintained by defendant in the dirt portion of the highway, causing injuries which resulted in the death of deceased.

Alameda street consisted of a concrete pavement 24 feet wide, flanked on each side by a 2-foot strip of macadam and unpaved the balance of the width of the highway, which was a total of 40 feet except for an added 20-foot strip on the west side, starting at a point opposite the north curb of Gage avenue and extending about 120 feet south. The pole was 1.3 feet in diameter and its center was placed 6 feet from the edge of the concrete, or 4 feet from the edge of the macadam shoulder, and slightly north of a point opposite the prolongation of the south curb of Gage avenue. The pole was black, unmarked, and bore no light. It was a "junction pole," erected to support wires running north and south on Alameda and east on Gage.

There was evidence that the dirt portion of the road, including the 20 feet additional width at that point, was frequently traversed on both sides of the junction pole when traffic was somewhat congested. The nearest street light was at the next corner. The pole could ordinarily be seen at night by a driver going south, when within 25 to 30 feet of it. North of the pole a few feet was a post painted white and bearing a sign to direct motorists entering Alameda from Gage avenue.

As Renne's car, going south, approached the intersection of Gage avenue, he swung to the left to pass another south-bound car. As he came abreast of it, a third car entered Alameda from Gage, making a left turn to go south. To avoid hitting this third car, Renne swung back sharply to the right, then to the left, and back to the right, running onto the dirt shoulder on the west side of Alameda and going about 40 feet ahead on the dirt until he hit the pole.

Motion for directed verdict in favor of defendant was granted on the following grounds: "First: That the evidence shows no negligence on the part of the defend-

ant Southern California Edison Company. Second: That the evidence shows, without conflict, that the death of plaintiffs' daughter was caused solely by the negligence of the driver of the car in which she was riding. Third: That the evidence shows, without conflict, that the defendant maintained the pole that was struck under an easement that was superior to the right of the public to use Alameda Street as a public highway, and that any use of that street as a public highway by the deceased, or by the driver of the car in which she was riding, was subject to defendant's right to maintain this pole at the place where it was located, and that, insofar as her death resulted from the automobile striking the pole, such a collision was in the nature of a trespass upon the property of this defendant, to-wit: the pole, at the place where the defendant had the unqualified right to maintain the pole. Fourth: That the evidence shows, without conflict, that the defendant was in the ownership and exercise of a franchise granted by the County of Los Angeles, permitting it to maintain poles along the county highways of said county, and that the pole struck by said Renne was maintained under and in accordance with the terms of said franchise, and therefore affords a complete defense to this action."

[1] "A directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given'. * * * Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." In re Estate of Flood, 217 Cal. 763, at page 768, 21 P.(2d) 579, 580.

[2] Evidence was presented showing that predecessors in interest of defendant had run lines over this land as early as 1904, the street being dedicated in 1907. A franchise was later obtained by defendant from the county of Los Angeles, and it was stipulated that they operated under it. The franchise provided among other things that in the maintenance of defendant's equipment "no part of said system or the appliances or attachments thereto shall be so located as to interfere with the use of the highway for travel." While it appears that the defendant under the franchise was lawfully entitled to run its lines over part of the highway, there is nothing in the evidence nor in the cases cited which would support its suggestion that it was enjoying its easement by virtue of a right "superior to the easement of the public for highway purposes." The question of law as to whether defendant was legally authorized to install and maintain such a pole could properly be determined by the court; but the issue as to whether or not the pole was being negligently maintained at the time of the accident was properly a question of fact for the jury. Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481. We cannot say as a matter of law that defendant was not negligent in the manner in which it maintained the pole, nor is it within our province to express an opinion as to the finding of fact which the jury might make on this issue. See Stewart v. San Joaquin L. & P. Corporation, 44 Cal.App. 202, 186 P. 160, and Lim Ben v. Pacific G. & E. Co., 101 Cal.App. 174, 281 P. 634.

[3, 4] The questions whether the driver Renne was negligent and whether such negligence, if any, proximately caused the accident are likewise for the jury. When "an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in determining the proximate cause (45 C.J. 897–925)," and "whenever the standard of duty is not fixed and there is introduced substantial evidence on the subject of proximate cause it is a question of fact for the jury." Lacy v. Pacific G. & E. Co., 220 Cal. 97, 29 P.(2d) 781, 783. "Where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury." Lacy v. Pacific G. & E. Co., supra.

Since the questions as to the negligence, if any, of defendant and of Renne, and as to whether either or both constituted the proximate cause of the accident and the death of deceased were matters of fact which the jury should determine, the motion for a directed verdict should have been denied and the case submitted for their determination.

[5] It was vigorously contended by defendants and amici curiæ that a public utility has by virtue of its franchise a superior easement in the place where it locates its poles, and that it cannot be held liable for doing what the law permits it to do. This argument is already answered in the above opinion. The public permission, it is true, precludes any characterization of the pole as a nuisance; it is lawfully there and cannot be abated. But, though not a nuisance, it may, by reason of its location or maintenance without warning signs, lights, guards, or other precautions, constitute a danger to traffic; and, if the danger is sufficiently great, and it can be avoided by the exercise of reasonable care, either in relocation or the placing of effective warning devices or guards, then the jury might find negligence in the failure to take such steps.

This proposition, and the authorities which support it, will be found fully discussed in the recent case of Hayes v. New England Tel. & Tel. Co., 86 N.H. 486, 174 A. 49, where the collision occurred with a telephone pole standing three feet from the edge of the tarred surface of a road. The court said (86 N.H. 486, 174 A. 49, 54): "The idea that the action of municipal authorities in granting licenses to erect obstructions in public highways bars a recovery by any person injured by the mere presence of such an obstruction, again appears to be peculiar to the state of Massachusetts. The same contention has often been made and overruled in other jurisdictions and is contrary to the general rule prevailing elsewhere, which has been stated as follows: 'If the company has a license from a city to construct its poles in the streets, they will not be declared a nuisance, but if they clearly appear to be improperly located thereon, and injury results therefrom, the company will be liable, notwithstanding that it has a license from the city to construct its poles in such places. * * *' Jones, Telegraph & Telephone Companies (2d Ed.) § 196. To the same effect is Keasby, Electric Wires (2d Ed.) § 225, where it is said: 'It is no doubt true that a person setting up a pole in the street without due regard for the safety of the public in the ordinary use of a street, may be liable for injuries directly caused by the presence of the pole even though he may have had permission or even authority to erect the pole for a certain proper purpose. The liability arises out of the neglect of the precautions required by the conditions of public travel and exists because the grant is made either expressly or by implication, subject to the requirements of public safety in the use of the streets.' "

A number of cases cited by defendants as establishing a contrary doctrine appear upon examination to be clearly distinguishable. Thus, in Waldorf v. City of Alhambra (Cal.App.) 45 P.(2d) 207, there was an ordinary raised concrete curb and sidewalk and the car mounted the curb. And in Fiechter v. City of Corbin, 254 Ky. 178, 71 S.W.(2d) 423, the court pointed out that the street was adequately lighted and the pole easily observable; that the vision of the driver of the car was impaired by water on the windshield, which he could have discovered and eliminated by the exercise of ordinary care. The opinion nevertheless recognizes the general rule that, where a pole is located in too close proximity to the traveled portion of the highway, and the driver is free from contributory negligence, recovery may be justified.

The judgment is reversed.

THOMPSON, Justice.

I dissent.

It appears beyond question that the pole maintained by respondent in the instant case was one of a line of poles located six feet from the paved portion of the highway and that, had they been moved farther from the highway, the cross-arms and wires would have been above private property. The accident happened on a clear night, when the paved portion of the street was clearly distinguishable from the unpaved part. Under such circumstances, it was the duty of the trial judge to direct a verdict for the defendant. The rule stated in Waldorf v. City of Alhambra (Cal.App.) 45 P.(2d) 207, and supported by the authorities therein cited, is to the effect that the pavement, parkways, and poles constitute a barrier or warning to the alert driver. I think the rule is

founded in common justice and should be applied in this case. Negligence cannot be predicated upon the location of light or telephone poles off and away from the highway, where reasonable men would not anticipate the presence of vehicular or other traffic.

I concur: SHENK, J.



5 Cal.2d 54

NORTON et al. v. CITY OF POMONA et al.

L. A. 15445.

Supreme Court of California.

Dec. 31, 1935.

Rehearing Denied Jan. 30, 1936.

1. Electricity ⇐16(1)

Maintenance of light pole along property side of curb line and flush with curb, as authorized by statute, was not a "nuisance," rendering electric company liable to motorist colliding with pole (Gen.Laws 1931, Act 2720; Civ.Code, § 3482).

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

2. Electricity ⇐19(5)

Evidence *held* to support finding that maintenance of electric pole on property side of curb and flush with curb was negligence causing collision resulting in injuries to motorists, and that motorists were not contributorily negligent.

3. Appeal and error ⇐1010(1)

Trial court's findings supported by evidence are conclusive and cannot be substituted by reviewing court's deductions.

4. Abatement and revival ⇐58(½)

Cause of action founded on tort to person does not survive death of either person to or by whom wrong is done.

5. Judgment ⇐273(1)

Power to enter judgments nunc pro tunc is inherent in courts.

6. Judgment ⇐273(2)

When state of record or minutes show that suitor was entitled to particular judgment which was not entered when it might have been, judgment may subsequently be entered so as to relate back to time when it should have been entered, providing delay was not occasioned by applicant, and such order should be granted or refused as justice may require in particular case.

7. Judgment ⇐326

Court has authority to order findings of fact and conclusions of law, required to be filed in decision of case tried without jury, to be filed nunc pro tunc (Code Civ.Proc. §§ 632, 633).

8. Judgment ⇐273(5)

Statute providing for entry of judgment after party's death on verdict or decision before death does not dispense with rule authorizing court to direct that its decision, so far as necessary to protect parties' rights, shall be entered nunc pro tunc as of day anterior to party's death (Code Civ.Proc. § 669).

9. Judgment ⇐273(5)

Court *held* authorized after plaintiff's death to file findings and enter judgment in action for injuries tried without jury nunc pro tunc as of date of order for judgment to prevent abatement of action (Code Civ. Proc. §§ 632, 633, 669).

10. Municipal corporations ⇐812(2)

Failure to file verified claim for damages with legislative body of city before filing suit for injuries resulting from dangerous condition of street *held* to preclude recovery against city (Gen.Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1).

11. Municipal corporations ⇐812(4)

Failure to file verified claim for damages with legislative body of city within ninety days as required by statute *held* to bar recovery against city for injuries, notwithstanding accident happened eight and one-half months before effective date of statute, where there were three and one-half months remaining before cause of action would be barred by limitations (Gen.Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1; Code Civ.Proc. § 340).

12. Constitutional law ⇐169, 191

Municipal corporations ⇐812(4)

Enforcement of act requiring person suing city for injuries first to file verified claim for damages with legislative body of city would not make act retroactive and invalid as to plaintiffs whose cause of action arose before effective date of act, since remedial changes may be made applicable to pending actions or to causes of action not yet sued on, provided that vested rights are not destroyed or obligations of contracts impaired (Gen.Laws 1931, Act 5149, §§ 1, 4; Act 5150, § 1).

THOMPSON, J., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Alma A. Norton and Ed Norton against the City of Pomona and the Southern California Edison Company, Limited, wherein Alma A. Norton, executrix of the estate of Edwin S. Norton, sometimes known as Ed Norton, deceased, was substituted as plaintiff. From a judgment for plaintiffs, last-named defendant appeals, and from a judgment for first-named defendant, plaintiffs appeal.

Affirmed.

Prior opinion, 43 P.(2d) 586.

Rehearing denied; THOMPSON, J., dissenting.

Roy V. Reppy, B. F. Woodard, and E. W. Cunningham, all of Los Angeles, for appellant Southern California Edison Co.

Alfred Sutro, Samuel L. Wright, and Pillsbury, Madison & Sutro, all of San Francisco, amici curiæ.

Thomas J. Straub, and W. H. Spaulding, both of San Francisco, amici curiæ for Pacific Gas & Electric Co.

Ray L. Chesebro, City Atty., and Frederick Von Schrader and Leon Thomas David, Asst. City Attys., all of Los Angeles, amici curiæ for City of Los Angeles.

Harold Huls, City Atty., of Pasadena, amicus curiæ for City of Pasadena.

Bernard Brennan, City Atty., of Glendale, amicus curiæ for City of Glendale.

Kelley & Hews, H. L. Hews, and Joseph Seymour, all of Riverside, for respondent Norton.

Charles R. Stead, and Allard, Stead & Whyte, all of Pomona, for respondent City of Pomona.

PER CURIAM.

A hearing was granted in this case in order to consider more fully the contention of defendant Southern California Edison Company, Limited, that it could not be deemed negligent in maintaining its power pole in a location approved by public authority. The same point was involved in Gerberich v. Southern California Edison Company (Cal.Sup.) 53 P.(2d) 948, this day decided, and we there approved the holding of the District Court of Appeal. In conformity with the conclusion reached therein, we hereby adopt the following opinion of Mr. Justice pro tem. Willis as the opinion of this court:

There are two appeals herein. One is by defendant Southern California Edison Company, Limited (hereinafter referred to as "Edison Company") from a judgment for damages in favor of plaintiffs, Alma A. Norton and Ed Norton, wife and husband, for injuries to person and property resulting from a collision of their automobile with an electric power and light pole erected and maintained by the Edison Company in the parkway near the corner of a street in the city of Pomona. The other is by plaintiffs from a judgment in favor of defendant City of Pomona, a municipal corporation.

Plaintiffs commenced the action on December 31, 1931, and by their second amended complaint sought to charge defendant city of Pomona with maintaining a public street in a dangerous or defective condition, and charged both defendants with negligence in maintaining an electric power and light pole at a place on said dangerous and defective portion of said street in a dangerous and unguarded position thereon, as a result of which plaintiffs, without knowledge on their part of such dangerous condition, drove their automobile into and collided with said pole, causing the damage complained of. After trial before the court without a jury, the cause was, on April 14, 1933, ordered submitted on filing of briefs. On June 2, 1933, the court made its minute order for judgment in favor of plaintiffs and against defendant Edison Company for $6,065 damages, and in favor of defendant city of Pomona. The record fails to show that findings were waived. On June 23, 1933, plaintiff Ed Norton died by his own hand, and on July 24, 1933, letters testamentary were issued to Alma A. Norton as executrix of his estate. On August 22, 1933, plaintiff Alma A. Norton, individually and as executrix of the estate of Ed Norton, moved the court for an order to file findings and judgment in the case nunc pro tunc as of the date of June 2, 1933. On November 1, 1933, the court granted the same and on the same date signed and filed its findings and conclusions and the judgment herein appealed from, which judgment was entered by the clerk on November 6, 1933, nunc pro tunc as of June 2, 1933, pursuant to the order of court so to do, incorporated in the judgment. On November 10, 1933, Alma A. Norton, as executrix, was substituted in the place

and stead of Ed Norton as plaintiff, the defendants reserving all objections to entry of the findings and judgment nunc pro tunc as of June 2, 1933. On November 14, 1933, Alma A. Norton and Alma A. Norton as executrix filed notice of appeal from the judgment in favor of city of Pomona only, and on November 15, 1933, defendant Edison Company filed its notice of appeal from the judgment against it.

Appeal of Edison Company.

On this appeal it is urged (1) that the fact established by the undisputed proof that the pole was in a parkway of a public street and there maintained under governmental authorization, was a complete defense as a matter of law, inasmuch as it showed that the maintenance of such pole did not constitute a nuisance; (2) that the company was not guilty of any negligence in the maintenance of said pole; (3) that plaintiffs were guilty of contributory negligence as a matter of law; and (4) that the action abated upon the death of the husband, Ed Norton, and that it was error to order judgment in favor of plaintiffs nunc pro tunc as of a date prior to his death, and particularly in favor of said deceased plaintiff.

To apprehend the nature and significance of the problems presented on both appeals herein it is necessary to reproduce the scene and circumstances of the accident in some detail. At the time of the accident, Fifth street in the city of Pomona ran east and west, and in its course intersected San Antonio avenue at right angle, both being public streets of said city. West of the intersection Fifth street was 100 feet wide between property lines and 68 feet wide between curb lines, and was paved and used from curb to curb. East of the intersection Fifth street was 70 feet wide between property lines and 46 feet wide between curb lines, the reduction in width being approximately 11 feet on each side, the portion between curb lines being paved and generally used for vehicular travel. On the southeast corner of this intersection there was a curb erected, forming a rounded corner and thence proceeding along the respective streets, the street pavement on the one side and the ground level on the other side being even with the top of the curb. The 12 foot space between property line and curb line at this corner, on the south side of Fifth street, consisted of earth filled to the curb level, with no sidewalk constructed thereon.

At a point on the property side of the curb on the south side of Fifth street, and flush with the curb, there stood in a vertical position an ordinary electric light and power pole, about 12 inches in diameter near its base, its west surface being about 16 feet from the easterly curb line of San Antonio avenue, being unpainted and of a neutral color, with no lights or warning signs thereon. The pole in question had been erected and was maintained by the Edison Company under constitutional franchise and under an ordinance of the city of Pomona adopted under authority of the Broughton Act (Act No. 2720, Deering's Gen.Laws, p. 1244), by the terms of which the company was given the right to select the place of location of its poles along the property side of curb lines and flush with said curb. At least two previous collisions of automobiles with this pole were shown by the evidence as tending to show the dangerous character of such pole. Gorman v. County of Sacramento, 92 Cal.App. 656, 664, 268 P. 1083. The space between the curbs and property lines at this corner had in the past been used by the public in turning that corner, and the surface of such space up to the pole was clear and level with the curb and street pavement and in wet weather and darkness would present the appearance of a used highway.

About 8 o'clock on the night of January 1, 1931, plaintiffs drove their automobile eastward along the south side of Fifth street, about 8 feet from the curb at a speed of 10 or 12 miles per hour as it entered the intersection at San Antonio avenue, plaintiff Ed Norton driving. It was raining and very dark, and the windshield of the automobile was obscured by moisture, a wiper working on the driver's side over a portion thereof. The headlights of the automobile were lighted, but there were no lights on or near the pole nor at this intersection, except at a filling station at the southwest corner, and a small light on a gooseneck attached to the pole on the westerly side of the intersection. As the automobile entered the intersection, plaintiffs were unaware of the narrowing of the street and a course was maintained in a straight line eastward, the wheels running over the level curb line on the easterly side onto the dirt space at the corner and directly against the pole above described. Both plaintiffs at the same instant saw the pole for the first time when some 10 or 12 feet from it, when the driver put

on the brakes but could not stop the car in time to avoid collision.

On these facts above stated and substantially found by the trial court, it was also found "that the erection, maintenance and permission of said pole at said time and place was negligently done and permitted by the defendant, Southern California Edison Company"; "that said pole, so negligently placed and maintained, constituted a hazard to the travelling public and to plaintiffs herein"; and that "the negligent location and condition of said pole caused the automobile driven by the plaintiff, Ed Norton, in which the plaintiff Alma A. Norton was riding, to run into and collide with the said pole." The court further found that there was no contributory negligence on the part of plaintiffs, and that they had not filed any claim for damages with the legislative body of the city of Pomona, as required by the act relating to liability and damages of municipalities, etc., approved June 19, 1931, and in effect August 14, 1931. From these facts, the court concluded that plaintiffs were not entitled to recover from the city of Pomona, but were entitled to judgment against the Edison Company for $6,065.

[1] That the maintenance of the pole in the place and under the circumstances shown herein cannot be deemed a nuisance is settled by section 3482 of the Civil Code and decisions of our appellate courts, for nothing which is done or maintained under the express authority of law can be deemed a nuisance. Carson v. Central R. Co., 35 Cal. 325; Barry v. Terkildsen, 72 Cal. 254, 13 P. 657, 1 Am.St.Rep. 55; Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481. But while the erection and maintenance of the pole herein appear to have been authorized by ordinance, there still exists a liability on the part of the Edison Company for any consequential injuries arising from its negligence in exercising its right and power granted to erect and maintain poles within the city of Pomona. Carson v. Central R. Co., supra; Barrett v. Southern Pac. Co., supra.

[2, 3] Herein plaintiffs sued upon the theory of negligence—not that of nuisance—and contend that the city of Pomona negligently permitted a dangerous and hazardous condition of a public street to exist, and that the Edison Company negligently maintained a pole in such dangerous place, the two acts concurrently operating to proximately cause the injuries to plaintiffs. In this case it became a question of fact for the court to determine whether under the circumstances shown the maintenance of the pole and the street, separately or together, constituted negligence on the part of either or both defendants (Barrett v. Southern Pac. Co., supra), and whether such negligence, if any, proximately caused the injuries to plaintiffs, without contributory negligence on their part. The evidence establishing the facts and circumstances herein is such that reasonable minds might draw different and opposite inferences both as to negligence and contributory negligence. The court found that the defendant Edison Company negligently erected and maintained the pole in the place shown; that such placing and maintaining constituted a hazard to the traveling public and caused the happening of the collision; and that there was no negligence on the part of plaintiffs contributing thereto. There was ample evidence to support the conclusions deduced therefrom by the court, and under the well-known rule these findings are binding and conclusive on this appeal and cannot be substituted by any of our own deductions.

This disposes of the first three points presented by the Edison Company, and leaves for determination the question of the propriety and validity of the act of the court in filing its decision and judgment after death of plaintiff Ed Norton, nunc pro tunc as of the date of making its order for judgment on June 2, 1933.

[4] A cause of action founded on tort to the person, such as the instant action for personal injuries, does not survive the death of either the person to or by whom the wrong is done. This is the common-law rule adopted by this state, and there is no statute changing the rule as affected by the situation herein. Clark v. Goodwin, 170 Cal. 527, 150 P. 857, L.R.A.1916A, 1142; Munchiando v. Bach, 203 Cal. 457, 264 P. 762. Hence the cause of action in favor of plaintiff Ed Norton abated upon his death on June 23, 1933, unless such abatement was avoided by the action of the trial court in filing its findings and entering its judgment nunc pro tunc as of June 2, 1933, a date prior to his death.

[5-8] The power to enter judgments nunc pro tunc is inherent in the courts. Where the party is not at fault, the determinative consideration moving the court is whether or not the action at the death of the party was ready for rendition of final

judgment. When the state of the record or the minutes kept by the court or clerk show that a suitor was entitled to a particular judgment but that the judgment was not entered when it might have been, such judgment may subsequently be entered so as to relate back to the time when it should have been entered, providing the delay was not occasioned by the party applying. Such an order should be granted or refused as justice may require in view of the circumstances of a particular case. Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396. Notwithstanding sections 632 and 633 of the Code of Civil Procedure make it essential to a decision of a case tried without a jury and in which findings are not waived, that findings of fact and conclusions of law must be made and filed, the court has the same authority to order such findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. The decision which the parties have invoked the court to make is not necessarily the statutory and technical "decision" referred to in section 633, but it is the final determination of the rights of the parties and includes every step or act of the court which is requisite to a final judgment upon their rights. These rights are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve them. Nor does section 669 of the Code of Civil Procedure, which provides for entry of judgment after death of a party on a verdict or decision before death, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties shall be entered nunc pro tunc as of a day anterior to the death of a party. Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 P. 328; Leavitt v. Gibson (Cal.App.) 28 P. (2d) 41.

[9] In view of the facts as revealed by the record herein, measured by the rules above stated and which were applied to a similar set of facts in the cases cited, we conclude that the trial court was fully justified in making and carrying out its nunc pro tunc order. This conclusion renders it unnecessary to consider the question of the effect of abatement as to one spouse by death upon the rights of the other in respect to community property represented by the cause of action.

Appeal by Plaintiffs.

On this appeal it is urged (1) that the evidence showed that defendant city of Pomona was guilty of negligence proximately contributing to cause the accident and injuries to plaintiffs by reason of the condition in which it maintained the street at the place of the accident, and (2) that failure to file a verified claim for damages with the legislative body of the city before filing suit does not preclude plaintiffs from a recovery. We will first determine the second point, as it logically comes first in order of consideration.

[10] In 1931 the Legislature enacted, and on August 14, 1931, there became effective, an act which, in its principal parts, provided that "whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with [such officer and] the clerk or secretary of the legislative body of the municipality * * * within ninety days after such accident has occurred." Act No. 5149, § 1, Deering's Gen.Laws. On the same day another act duplicating the language above quoted, but with the words "and/or the negligence or carelessness of any public officer" inserted after the words "works or property," went into effect. Act No. 5150, § 1. Deering's Gen.Laws. Act No. 5149 also contains a provision (section 4) authorizing the municipality to compromise and pay any such claims. Act No. 5150 omits this provision. Nowhere in either act is there any provision requiring the filing of such claim as a condition precedent to commencing or maintaining action for the damages referred to. Nor does the charter of the city of Pomona contain any provision requiring the filing of such or any claims as a condition to maintenance of action thereon. Stats. 1911, p. 1913.

To hold that it is not essential to file a claim in accordance with this statute before bringing suit would have the effect of rendering the statute nugatory, a meaningless and purposeless legislative gesture, permitting a claimant to file a claim only if he chose to do so. This conclusion finds convincing support in the decision of Bancroft v. City of San Diego, 120 Cal. 432,

52 P. 712, 714, wherein the charter of the city in question provided that "all claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose." In deciding the case the court said: "But it is argued the charter does not say that no action shall be brought unless the claim is so presented, nor is there a limitation as to the right to sue. To hold that the city may be sued upon such demand after the expiration of six months, and without having presented the same, would be to hold that, notwithstanding the charter, such demand need not be presented. I can imagine no motive for the requirement unless a failure to so present the demand is fatal. If the law had read, 'Claims must be presented within six months, but a failure to so present them shall not affect their validity,' we should have been at a loss to understand the purpose of the law. It would have been a self-professed absurdity. I think the implication that a failure to present a claim is fatal to it is as plain as would have been an express declaration to that effect." This decision was expressly approved in the later case of Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345, wherein it was held that a general demurrer was properly sustained to a complaint against the city of San Diego for damages suffered by reason of the collapse of the "lower Otay dam," which contained no allegation of prior presentation of a claim for damages.

[11, 12] In the case of Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, 1030, in reviewing and approving the two cases above cited, the court quoted with approval the following portion of the latter decision: "The reason for this type of legislation, requiring claims to be first presented to the legislative body of a city or county before suit is brought is thus stated in an early case in this state: 'We think the intention of the legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit.' * * * This reason applies with like force to all claims against a city, however originating." In view of the foregoing statement of the law, we must assume that in its enactment of the act of 1931 the Legislature took notice of the law as thus interpreted and announced, and deemed it unnecessary to express in terms that which the law would imply. The inclusion of the clause authorizing a compromise of such claims supports this assumption. It would therefore appear that the failure to file their claim before bringing suit would bar plaintiffs from recovering against the city of Pomona. But plaintiffs contend that inasmuch as the accident happened some eight and one-half months before the effective date of this act, they could not comply therewith in respect to the requirement of filing their claim within ninety days after the accident occurred. This is true, but they still had, on August 14, 1931, three and one-half months remaining before their cause of action would become barred by the statute of limitation applicable to it. Section 340, Code Civ. Proc. They did not in fact commence their action thereon until December 31, 1931. During the intervening period, they had ample opportunity to comply with the statute by filing their claim. No advantage could rightfully be claimed or gained by the city by reason of the fact that the claim was not filed within ninety days after the occurrence of the accident, because in this case that requirement of the new law could not attach. Nor were any rights of the plaintiffs impaired by this action of the Legislature; nor can it be said that to enforce the provisions of the act would result in making it retroactive, for the act is remedial in nature and the Legislature has power to change rules of procedure or remedies, and such changes may be made applicable to pending actions or to causes of action not yet sued upon, provided that vested rights are not destroyed or obligations of contracts impaired Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.(2d) 185. In the case just cited this court held that failure to file a claim for damages resulting from an accident arising from a defective condition of a highway, which occurred two weeks before this act under consideration went into effect, was fatal to the action brought thereon.

For the foregoing reason and upon the authorities cited, we are constrained to hold that the failure of plaintiffs to file their claim prior to commencing their action herein bars them from recovery from the city of Pomona. These conclusions render it unnecessary to consider the ques-

tion of liability of the city under the evidence.

The judgments are, and each is affirmed.

THOMPSON, Justice.

I dissent.

The question concerning the liability of the defendant-appellant is very simple and may very properly be stated as follows: May it be considered guilty of negligence in maintaining an electric light pole inside the curb line of a street, and 16 feet from the curb line of an intersecting street, where the first-mentioned street is narrowed at the intersection? In other words, would the ordinarily reasonable man, guided by those considerations of care and prudence which ordinarily regulate the conduct of human affairs, have felt compelled to locate the poles elsewhere, or would he have been content to locate it off and away from the highway, resting upon the assurance that those who were to make use of the street would recognize the pavement and curb lines as a natural barrier beyond which they should not stray? I am compelled to conclude that ordinary prudence would dictate only that the pole should be located off and away from that portion constructed for vehicular traffic, and that negligence may not be predicated upon any such location. I believe that the principle announced in Waldorf v. City of Alhambra (Cal.App.) 45 P.(2d) 207, and supported by the authorities therein cited, is applicable in the present case and should be controlling. Barrett v. Southern Pacific, 207 Cal. 154, 277 P. 481, is no comfort to plaintiff, for the very patent reason that there the obstruction was maintained in the middle of the highway.



5 Cal.2d 214

FIRST-TRUST JOINT STOCK LAND BANK OF CHICAGO v. MEREDITH.

L. A. 13914.

Supreme Court of California.

Jan. 25, 1936.

1. Mortgages ⇐218

Statute providing for only one action for mortgage debt *held* procedural only, and cannot operate extraterritorially, and hence action was maintainable on mortgage note without first foreclosing mortgage on foreign lands (Code Civ.Proc. § 726).

2. Mortgages ⇐105

Note and mortgage should be construed together.

3. Mortgages ⇐218

In both California and Iowa, acceleration of maturity pursuant to mortgage may serve to accelerate maturity of note containing no acceleration clause, justifying action by mortgagee of Iowa lands to recover entire balance due on note after nonpayment of installment (Code Civ.Proc. § 726).

4. Evidence ⇐35

In action on mortgage note, where both parties conceded that liability depended on foreign law, such law would be assumed to be applicable law, of which court would take judicial notice under statute (Code Civ.Proc. § 1875, subd. 3).

5. Husband and wife ⇐229(6)

In mortgagee's action on note, where liability of wife as comaker was governed by Iowa law, wife's allegations that she was not personally liable because signing without consideration and solely to release dower *held* sufficient to permit introduction of evidence in support thereof.

6. Pleading ⇐11

In payee's action on note, comaker *held* not obliged to set forth probative facts supporting plea of want of consideration.

7. Mortgages ⇐218

Where mortgage provided for attorney's fees on foreclosure, and obligated mortgagors to pay all costs and expenses of collection and any costs, charges, or attorney's fees incurred in foreclosing mortgage, specific reference to attorney's fees on foreclosure *held* to exclude such fees from words "costs and expenses of collection," precluding recovery of attorney's fees in action brought on mortgage note prior to any foreclosure proceeding.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the First-Trust Joint Stock Land Bank of Chicago, a corporation, against Alice R. Meredith. From a judgment for plaintiff on the pleadings, defendant appeals.

Reversed and remanded.

Prior opinion, 44 P.(2d) 649.

William M. Hiatt and John M. Hiatt, both of Los Angeles, for appellant.

Freston & Files, Clarence M. Hanson, and Ralph E. Lewis, all of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the [illegible]eldant from a judgment on the pleadings.

The plaintiff sued the defendant as a co-maker of a promissory note payable to the plaintiff for $40,000, dated "State of Iowa, September 27, 1933." The note provided that both principal and interest should be payable in sixty-eight semiannual installments of $1,300 each, beginning on May 1, 1924, and ending on May 1, 1958. The note stated that it was secured by a mortgage deed made by Robert Meredith and Alice R. Meredith, his wife, and Harlan Meredith, a bachelor, to the plaintiff, conveying real estate in the county of Poweshiek, state of Iowa. The note and the mortgage were signed by the three persons mentioned. The note contained no acceleration of the maturity date of payment of the balance unpaid in case of default, but the mortgage provided that, in case of default in the payment of any installment, the mortgagee might without notice declare the entire debt immediately "due and payable," and thereupon the mortgagee should be entitled to immediate possession and appointment of a receiver and to foreclosure of the mortgage.

The plaintiff alleged that the installment due on November 1, 1931, remained unpaid and that the mortgagee exercised the option to declare the entire debt due and payable. This action was brought against Alice R. Meredith alone to recover the entire balance due on said note, without any proceeding first having been taken in the state of Iowa to foreclose the mortgage. There was no allegation that the security was valueless.

The defendant interposed defenses based on allegations that the note and mortgage signed by her were without any consideration and that her signature thereto was obtained solely for the purpose of releasing her contingent right of dower in the real estate involved; that the plaintiff knew the purpose of her signature to said instruments and placed no reliance on the personal credit of the defendant in the repayment of the loan; that under the laws of the state of Iowa a wife incurs no personal liability where the sole purpose of her signature is to relinquish her right of dower in the mortgaged property. The defendant also alleged that the action on the note alone was not maintainable without foreclosure first being had, but, if maintainable at all, the plaintiff was entitled to recover only the installment then due, in accordance with the terms of the note.

The court granted the plaintiff's motion for judgment on the pleadings and entered judgment for the plaintiff for the entire unpaid balance of principal and interest.

[1] The first point to be considered is whether the action is maintainable on the note without foreclosure of the mortgage on land in another state, in the absence of a showing that the security is worthless. The defendant relies on section 726 of the Code of Civil Procedure as indicative of at least a policy that an action on the note is not maintainable in this state where the mortgage covers land in another state without an allegation and proof that the security had first been applied to the discharge of the debt secured. Section 726 of that Code provides for but one action for the recovery of a debt secured by mortgage, which shall be in accordance with the provisions of part 2, title 10, chapter 1, of the Code of Civil Procedure. It is beyond dispute that these provisions deal with procedure only and cannot operate extraterritorially. Colton v. Salomon, 67 N.J.Law, 73, 50 A. 588; Maxwell v. Ricks (C.C.A.) 294 F. 255, 42 A.L.R. 460. This court has declared that the section applies only to mortgages on land in this state (Felton v. West, 102 Cal. 266, 36 P. 676), and the section will not operate to defeat an action on the note alone where the mortgage involves real property in another state or country (McGue v. Rommel, 148 Cal. 539, 545, 83 P. 1000; Denver Stockyards Bank v. Martin, 177 Cal. 223, 170 P. 428; see note, 42 A.L.R. p. 483). No argument or authorities are presented which would impel or justify a different conclusion at this time. Consequently the statement that the plaintiff "may not waive its security" and sue on the note has no application in the present case. The question whether the plaintiff has waived its security is one properly for the courts of the state of Iowa in the event the plaintiff institutes a foreclosure proceeding in that state after having brought its action on the note alone in this state.

[2, 3] The defendant next contends that in this suit on the note alone the plaintiff is bound by the terms of the note without reference to the provisions of the mortgage accelerating the due date of the balance

unpaid but which is not yet due according to the terms of the note; that consequently the plaintiff's recovery should be limited to the amount of the installment which became due on November 1, 1931. The law of this state appears to have become established that the note and mortgage should be construed together and be read as one contract; that, where the mortgage provides that upon default in the payment of any installment of principal and interest due, the balance of the principal and interest may be declared immediately due and payable, the declaration in accordance with the provision of the mortgage may serve to accelerate the due date of the note for all purposes. Beal v. Stevens, 72 Cal. 451, 14 P. 186; Clemens v. Luce, 101 Cal. 432, 35 P. 1032; Meyer v. Weber, 133 Cal. 681, 65 P. 1110; Hall v. Jameson, 151 Cal. 606, 91 P. 518, 12 L.R.A.(N.S.) 1190, 121 Am. St.Rep. 137. If we assume from the pleadings that the contract was executed in Iowa and was to be performed there, or that the parties intended that the law of Iowa should govern the interpretation and validity of the contract, nevertheless it does not appear that the law of Iowa is inconsistent with the result to be deduced from the foregoing cited cases, viz. that the provisions for acceleration in the mortgage alone may be read with the note and be employed to accelerate the maturity of the note for any purpose consistent therewith. See Clayton v. Whitaker, 68 Iowa, 412, 27 N.W. 296; Fox v. Gray, 105 Iowa, 433, 75 N.W. 339; Des Moines Savings Bank v. Arthur, 163 Iowa, 205, 143 N.W. 556, Ann.Cas.1916C, 498; Coffin v. Younker, 196 Iowa, 1021, 195 N.W. 591. See, also, notes, 34 A.L.R. 850 et seq.; 56 A.L.R. 185 et seq. The language of the mortgage does not necessarily restrict the operation of the acceleration clause to foreclosure proceedings, if, upon declaring the entire balance of the note "due and payable," after default as provided therein, a remedy upon the note alone is available under the law of the forum.

[4] We now come to a consideration of the contention of the defendant that she has stated a good defense under the law of Iowa. Both parties to the action appear to concede that the question whether the defendant is to be held personally liable under the facts pleaded, viz. where her signature was without consideration and was given only to release her dower rights, is governed by the law of the state of Iowa. The law of that state is therefore assumed to be the applicable law, Pritchard v. Nor[illegible], 106 U.S. 124, 1 S.Ct. 102, 27 L.Ed. 104, which the court will take judicial notice. [illegible] 1875, subd. 3, Code Civ.Proc.

[5, 6] In a number of the decisions of the Supreme Court of the state of Iowa it has been held that, in an action between the parties to the note and mortgage, a wife may defend against an attempt to impose liability on her by virtue of her signature on the ground that she received no consideration and that she signed merely for the purpose of disposing of her dower right and that her signature was obtained by the payee for no other purpose. In those cases it appears to be recognized that allegations to that effect, if supported by the proof of the facts surrounding the negotiations between the parties, will constitute a complete defense to any action as against the wife. In Le Fleur v. Caldwell, 196 Iowa, 727, 195 N.W. 234, the wife's signature appeared on both the note and a chattel mortgage. In an action to recover on the note and mortgage, the wife was permitted to defend on the ground of want of consideration as to her, and a denial of recovery as against her was upheld for the reason stated by the court that the proof showed that the wife's signature was procured merely as a matter of precaution against any future denial of the validity of the lien as having been made upon exempt property.

In the case of Hinman v. Treinen, 196 Iowa, 701, 195 N.W. 345, the wife with her husband had signed a note and a mortgage on real estate. The court followed several earlier cases cited by it and reversed a judgment against the wife, who had interposed the defense that her signature was obtained solely to release her contingent right of dower and that she received nothing therefor, for the reason that the proof sustained her plea.

In Insell v. McDaniels et ux., 201 Iowa, 533, 207 N.W. 533, a directed verdict in favor of the wife was upheld. There the court's decision was based on proof introduced in support of a defense that her signature to a note and mortgage also signed by her husband was without consideration. Further, in the case of Cooley v. Will, 212 Iowa, 701, 237 N.W. 315, decided June 20, 1931, a similar defense was allowed in a foreclosure action where the wife's signature appeared on several notes and mortgages with that of her husband. The court affirmed a dismissal of the proceeding as against the wife even though the record showed that the plaintiff testified that she at all times demanded the signature of the

wife, who was possessed of property in her own right as further security.

The foregoing and other similar cases are cited and adhered to in the case of Jones v. Wilson (Iowa) 2[illegible] N.W. 82, decided December 26, 1934.

The plaintiff relies on American Commercial & Savings Bank v. Kramer, 206 Iowa, 49, 219 N.W. 931, Millard v. Curtis, 208 Iowa, 682, 223 N.W. 489, Starry v. Starry & Lynch, 212 Iowa, 274, 234 N.W. 281, and First National Bank of Logan v. Mether, 217 Iowa, 695, 251 N.W. 505, as supporting its position that the defendant has not alleged facts sufficient to constitute the defense recognized by the above-cited decisions of the Supreme Court of Iowa. We cannot agree that the cases relied on support the plaintiff's position. In American Commercial & Savings Bank v. Kramer, an extension of the due date was accorded to the husband on condition that both the husband and wife should sign the agreement to pay the obligation involved. The defense of want of consideration, based on proof that the wife received nothing for her signature, was obviously not sustainable in view of the other facts appearing. In the case of Millard v. Curtis, the wife signed a note as sole maker. In an action on the note, the wife pleaded want of consideration. The plea was there likewise held not to be supported, although the wife received nothing, because it appeared that there was consideration which went to the husband. In that case, as in the preceding cited case, the line of decisions including Hinman v. Treinen, supra, was held not to be applicable. In Starry v. Starry & Lynch, a wife's signature was not involved. There a son-in-law signed as comaker with his father-in-law, and again the court distinguished the line of cases involving the suretyship of a wife for the debt of her husband and refused to extend the rule of those cases to the facts there at hand. In First National Bank of Logan v. Mether, the judgment in a foreclosure action denying recovery against the wife was reversed because the proof showed that the note of the husband was renewed by the bank solely on its demand for the signature of the wife, who was possessed of separate property, and for a mortgage of the husband's farm, as additional security. The cases of American Commercial & Savings Bank v. Kramer, Millard v. Curtis, and First National Bank of Logan v. Mether were distinguished by the court in the case of Jones v. Wilson, supra, and held not to be inconsistent with the case of Cooley v. Will, supra, and similar cases.

In the present case we have only the question of the sufficiency of the defendant's statement to constitute a defense. That she has stated enough and should be permitted to introduce evidence in support of her allegations that her signature was without consideration and was given and obtained solely for the purpose of releasing her contingent dower right sufficiently appears from the decisions herein cited. This conclusion accords with the views of the courts of this state as to the sufficiency of the plea of want of consideration. Rivera v. Cappa, 29 Cal.App. 496, 499, 156 P. 1016, 1017; Bank of Italy v. Wetzel, 82 Cal.App. 240, 244, 255 P. 254. The defendant was not obliged to and did not purport to set forth the probative facts which would support her plea. Whether she can support her plea by proof which will be deemed sufficient under the decisions of the Supreme Court of Iowa is obviously a question of fact to be determined upon a trial of the issues raised by her answer.

[7] The court also gave to the plaintiff a judgment for attorney's fees in the sum of $1,100. The defendant contends that an award for attorney's fees was not justified by the terms of the contract. The note did not provide for attorney's fees in event of suit to collect any installment of the principal and interest. The mortgage, following the provision that, in case of any default, the mortgagee may declare the entire balance unpaid immediately due and payable, be entitled to immediate possession and the appointment of a receiver, and to proceed to foreclose the mortgage, provided: "And in case of foreclosure, such sum as may be lawful shall be allowed by the court for attorney's fees and all costs and expenses incurred by said bank or its attorneys, and be included in the judgment or decree." There was also contained in the mortgage a specific agreement by the mortgagors to pay, in addition to the principal and interest, "all costs and expenses of collection, if any there shall be, and any costs, charges or attorney's fees incurred and paid * * * in maintaining the priority of this mortgage, or in foreclosing the same." It is obvious that a recovery for attorney's fees in a suit on the note alone was not contemplated by the language of the quoted provisions, which are the only provisions in the mortgage on the subject. Since a foreclosure is not sought in this action, it necessarily follows that the payment of attor-

ney's fees was not within the terms of the contract sued on. The specific reference to attorney's fees in the mortgage in the event of foreclosure must be deemed to exclude that item as coming within the terms of "costs and expenses of collection" included in the same instrument.

The judgment is reversed, and the cause remanded for further proceedings consistent with the views herein expressed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; CONREY, J.



5 Cal.2d 1

DABNEY v. EDWARDS.

L. A. 15343.

Supreme Court of California.

Dec. 30, 1935.

1. Frauds, statute of ⇐55

Term "real estate" at common law and in its generally accepted meaning, and as used in statute of frauds, is synonymous with "real property" (Civ.Code, § 1624, subd. 5).

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

2. Landlord and tenant ⇐70

At common law, estates for years were classified as chattels real and regarded as personalty.

3. Brokers ⇐43(2)

Interest created by oil leases for term of years *held* "personalty" and not "real estate" within statute of frauds, and hence real estate broker orally authorized to sell such leases could recover commission (Civ. Code, § 658, subd. 3; §§ 765, 773, and § 801, subd. 5; § 802, subd. 6; § 1624, subd. 5).

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

4. Brokers ⇐43(2)

Interest created by oil leases for term of years and so long thereafter as oil or gas is produced in paying quantities *held*, in absence of special provisions, in nature of "qualified" or "determinable fee," and to be "real estate" within statute of frauds, and hence real estate broker orally authorized to sell such leases could not recover commission (Civ.Code, § 658, subd. 3; §§ 765, 773, and § 801, subd. 5; § 802, subd. 6; § 1624, subd. 5).

[Ed. Note.—For other definitions of "Determinable Fee" and "Qualified Fee," see Words & Phrases.]

5. Landlord and tenant ⇐72

Habendum clause dominates period for which a lease shall run.

6. Landlord and tenant ⇐37

Nature of interests created by lease must be determined by an analysis of the instrument as a whole.

7. Brokers ⇐43(2)

If oral agreement authorizing real estate broker to sell oil leases was severable, broker could recover commission for sale of those leases which did not violate statute of frauds, but if agreement was not severable, broker could not recover any commission where agreement as to some of leases violated statute (Civ.Code, § 658, subd. 3; §§ 765, 773, and § 801, subd. 5; § 802, subd. 6; § 1624, subd. 5).

8. Stipulations ⇐14(10)

In broker's action for commission which defendant vendor agreed to pay salesman on sale of oil leases, stipulation that salesman was licensed real estate salesman under broker, who was duly licensed, supporting finding that salesman was broker's agent.

9. Brokers ⇐40

That vendor agreeing with real estate salesman to pay commission on sale of oil leases did not know that salesman was broker's agent did not prevent broker from recovering commission as undisclosed principal.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Walter E. Dabney against L. T. Edwards to recover a real estate broker's commission. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Judgment reversed.

Prior opinion, 43 P.(2d) 848.

E. V. Knauf, of Los Angeles, for appellant.

H. C. Morton, Chester F. Dolley, Hanna & Morton, and Fredericks, Hanna & Morton, all of Los Angeles, for respondent.

PER CURIAM.

The petition for a hearing in this case was granted for the reason that there

were pending in this court several cases involving important questions with reference to the nature of the legal interests created and conveyed by certain oil and gas leases, and it was deemed advisable to postpone a final determination of the question involved in this case until the nature of such interests should be definitely determined and defined by this court. The facts of the case are succinctly and correctly set forth in the opinion of the District Court of Appeal and are as follows: "On January 25, 1929, Edward C. Doak was a licensed real estate salesman acting under Walter E. Dabney, the respondent, a licensed real estate broker. On that date he was authorized orally by appellant to sell for appellant certain oil leases, all of which were for a term of years, and two of which provided, in addition to the term specified, that the leases were to continue 'so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save. * * *' The sale of the leases was consummated, appellant contending in the court below that Doak had agreed to accept 2½ per cent. commission, which was paid. Doak testified and the court found upon sufficient evidence that the agreement called for a commission of 5 per cent., one-half of which was to be paid as installments were paid on the purchase price of the leases, and the other one-half on the happening of a contingency which did occur prior to the bringing of the lawsuit. Respondent admitted the receipt of one-half of the commission, and proved that the contingency upon which the payment of the other one-half depended had occurred, and demanded payment of the additional 2½ per cent. for which he obtained the judgment, from which this appeal is taken. There is also an appeal from an order denying motion for new trial."

The primary contention presented by appellant as grounds for reversal is that the agreement to employ respondent was of the kind required to be in writing, and that since it was oral, respondent cannot recover. Subdivision 5 of section 1624 of the Civil Code provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. The question presented, therefore, is whether an agreement, employing and authorizing a real estate broker to sell oil and gas leases such as are here involved, is within the statute of frauds; or, more specifically, does such an agreement contemplate the purchase of "real estate" as the term is used in subdivision 5 of section 1624 of the Civil Code?

It should be kept in mind that the agreement here involved between the seller and a broker or agent deals solely with the compensation or commission receivable by the broker or agent for his services rendered in selling "real estate" and that subdivision 5 of section 1624 does not contain any provision specifically relating to "an interest in real estate." It is subdivision 4 of section 1624 of the Civil Code which provides that an agreement for the sale of real property *or an interest therein* shall be invalid unless the same or some memorandum thereof is in writing and subscribed by the party to be charged or by his agent. This latter type of agreement in which the parties are the seller and the buyer and the subject-matter is the property to be sold and purchased is, of course, separate and entirely distinct from the agreement here under consideration in which the parties are the seller of the property on the one hand and the broker or agent on the other, and the subject-matter of the agreement is the compensation or commission to be paid the broker or agent. In the agreement here involved "an interest in real property" may only be read into the subdivision by a broad and liberal interpretation of the term, "real estate."

Appellant contends that the term, "real estate" as the term is used in subdivision 5 of section 1624 of the Civil Code should be given a broad and liberal interpretation; that it should not be limited to the technical common-law definition of an estate of freehold, but should be enlarged to include "any interest or estate in land." Respondent contends that the term, "real estate" has a fixed, definite meaning, derived from the common law, which is synonymous with real property, which includes therein only freehold estates and excludes therefrom estates for years and estate of lesser duration, such as estates at will, from year to year, and at sufferance. It is his contention that although estates for years under the common law may be interests or estates in real property, they are not "real estate" or real property, but under the common-law definition are classified as "chat-

tels real," or personal property. It appears from the record that the case was tried upon the theory that the leases involved were similar in terms and were properly classifiable in the same category of property interests. At the oral argument before the District Court of Appeal it was suggested, apparently for the first time, that the two leases which provide for a term of twenty years, and "so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save" created freehold estates in the nature of determinable fees, and that, notwithstanding the fact that the two leases which provided for a definite term of years might be properly classified as estates for years, and therefore, under the common-law definition of chattels real, as personal property, the two leases which contained the further provision that the term should continue "so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save" must be classified as freehold estates, and, therefore, necessarily defined as "real estate."

[1-3] The District Court of Appeal concluded, and in our opinion correctly so, that the definition of real estate as contained in said subdivision 5 of section 1624 of the Civil Code conformed to the common-law definition of real estate and that the oil and gas leases herein which provided for a definite term of years, being properly classified as estates for years, were chattels real, or personal property, and, therefore, an agreement authorizing or employing an agent or broker to purchase or sell oil and gas leases which provide for a definite term of years is not invalid by reason of the fact that it is not in writing. In so far as the opinion of the District Court of Appeal may be limited in its discussion to oil and gas leases which provide for definite terms, we are in accord with the reasoning and conclusion therein expressed, and as so limited, we adopt that portion of the opinion of the District Court of Appeal which deals with the question of whether or not the interests created by oil and gas leases providing for definite terms are, or are not, "real estate" within the scope of subdivision 5 of section 1624 of the Civil Code. Said opinion, written by Mr. Justice Roth pro tempore with certain modifications, is as follows:

"Real estate at common law and in its generally accepted meaning is synonymous with real property. Estates for years at common law were classified as chattels real and regarded as personal property. Except in those cases where our courts have construed some particular statute, which by its own terms so defined real estate as to include an estate for years, a claim to an estate in or a right to possession of real property, the common law definition has been definitely maintained and indorsed by the courts of this state. 10 Cal. Jur. 601; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 P. 680; German-American Savings Bank v. Gollmer, 155 Cal. 683, 686, 687, 102 P. 932, 24 L.R.A. (N.S.) 1066; County of Ventura v. Barry, 207 Cal. 189, 277 P. 333; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243; Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L.R.A. (N.S.) 609; Barr Lumber Co. v. Perkins, 214 Cal. 531, 6 P.(2d) 948.

"A perusal of the foregoing cases discloses the persistence with which our courts have maintained that 'the common law upon the subject has not been changed by our statutes. * * * (And that) there is a marked difference between things real, and an interest or estate in things real.' Jeffers v. Easton, Eldridge & Co., supra, 113 Cal. 345, at page 353, 45 P. 680, 681. This position is further demonstrated by a comparison of the cases of Pike v. Psihogios, 68 Cal.App. 145, 228 P. 722, 723, and Nittler v. Continental Casualty Co., 94 Cal. App. 498, 271 P. 555, 558, 272 P. 309. In both cases hearings were denied by the Supreme Court. Both cases involved the construction of section 2 of 'An act to define real estate brokers and salesmen * * *' approved June 1, 1917 (see Deering's Gen. Laws, 1931 Ed., Act 112). In the Pike Case the court said: 'It will be observed that section 2 of said act, in its enumeration of the acts which only a duly licensed real estate broker may perform, does not specify either the sale of personal property, or the sale of a lease to real property. It was therefore not necessary for Katugios to obtain a license under said section 2 to perform the services rendered by him to the plaintiff, and which forms the basis of this counterclaim.' In 1925, section 2 of the act in question was amended. Stats. 1925, p. 600. Thereafter the court in the Nittler Case ruled exactly opposite to the rule in the Pike Case, the court saying:

'As a result of the Pike decision, the Legislature, at its next session amended this section of the act so as to expressly include within the definition of a real estate broker one who negotiated for or sold or exchanged a lease in real property.'

"While the exact question presented here has never been decided in this state with reference to oil leases, it has been squarely decided with reference to ordinary leases. Guy v. Brennen, 60 Cal.App. 452, 213 P. 265. The legal doctrine announced by Guy v. Brennen, supra, is that the words 'real estate' as used in subdivision 5, § 1624, Civil Code (subdivision 6 at the time of that case), mean real property and not personal property and the corollary which follows, to wit: That a contract of employment made with a real estate broker 'to sell a lease for years' is not within the statute of frauds and need not be in writing. This doctrine is apparently followed with approval in Layne v. Malmgren, 99 Cal.App. 742, 279 P. 670; County of Ventura v. Barry, 207 Cal. 189, 277 P. 333; Spalding v. Bennett, 93 Cal.App. 577, 269 P. 948; Lind v. Huene, 205 Cal. 569, 271 P. 1087; Edgecomb v. Callahan, 132 Cal. App. 248, 22 P.(2d) 521. Other authorities are to the same effect: 17 Cal.Law Review 187; Nelson Law of Real Estate Brokerage, page 25; Myers v. Arthur, 135 Wash. 583, 238 P. 899; Lowenmeyer v. National Lumber Co., 71 Ind.App. 458, 125 N.E. 67; Barr v. Campbell Mill Co., 154 Wash. 83, 280 P. 929, 284 P. 1119.

"Appellant vigorously assails this doctrine, contending that there is a substantial distinction between an oil lease and an ordinary lease (Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 P. 483, 486, 20 L.R.A. (N.S.) 211); and that Guy v. Brennen, supra, has in effect been overruled in the case of Wilson v. Earp, 91 Cal. App. 538, 267 P. 112.

"In the Graciosa Case the court says, 155 Cal. 140, at pages 144, 145, 99 P. 483, 486, 20 L.R.A. (N.S.) 211, speaking with reference to the difference between an oil lease and an ordinary lease: 'There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the plaintiff under its oil lease. * * * The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and' a chattel real at common law. Civ. Code, § 801, subd. 5; section 802, subd. 6; Harvey C. &. C. Co. v. Dillon, 59 W.Va. 605, 53 S. E. 928–937, 6 L.R.A. (N.S.) 628, and cases there cited; Thornton on Oil Leases, § 51. * * * The right of the lessee under this contract is more than that of the ordinary lessee. It is of a different character and for a different purpose. He has no right at all to the usufruct of the soil. His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole subject of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another.'

"In the Graciosa Case, as is suggested by the foregoing excerpt, the court was considering whether an oil lease could be assessed and taxed severally and separately from the real estate, the court holding that it could be so separately taxed, saying, 155 Cal. 140, at page 145, 99 P. 483, 486, 20 L.R.A. (N.S.) 211: 'It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it.'

"In the Graciosa Case, the court nowhere says that such a lease is real property, but on the contrary says: 'This right constitutes, for the term prescribed, a servitude on the land and a *chattel real at common law.*' (Italics ours.)

"It must be apparent, therefore, that even though our courts have recognized that there are substantial differences between an oil lease and an ordinary lease, that such recognition has not, by any decisions of the courts of this state, made an oil lease real property in the generic common-law sense of that phrase. * * * Our courts have held uniformly and unequivocally that the interest created by an oil and gas lease is a term for years, and as such it is personalty. Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann.Cas. 1913B, 1094; Barr Lumber Co. v. Perkins, 214 Cal. 531, 6 P. (2d) 948. * * *

"Appellant criticizes the soundness of the rule announced by Guy v. Brennen, supra, because the court in its opinion in that case failed to take into consideration, or at least in its opinion failed to refer to subdivision 3, § 658, or subdivision 5, § 801, Civil Code, adding further that section 773 of the Civil Code suggests a general distinction between 'chattel' and a 'chattel real.'

"No specific mention is made in the Brennen Case of these sections, but in Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 P. 680, 681, the court makes clear that by section 765 of the Civil Code, California follows the common-law distinction between freehold estates and estates for years, and says: 'The same distinction is to be found in section 14, and in sections 657–663 of the same Code.' And further, that the right of taking minerals mentioned in section 801, subd. 5, Civil Code, is not an incorporeal hereditament which constitutes the subject of the oil lease, but is an easement attached to other land as an easement appurtenant thereto. In other words, section 801 has to do with easements over a servient tenement appurtenant to a dominant tenement. There is no such question in this case.

"The fact that section 773 of the Civil Code provides that 'an estate for life may be created in a term of years' can have no significance, for the reason as stated in the Jeffers Case, 113 Cal. 345, pages 352, 353, 45 P. 680, 'A term for years is only personal property,—a chattel real. "An estate for life, even if it be peur autre vie, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate." 2 Bl. Comm., p. 143. See, also, pages 385–387. "All leases for years are held by law to be of less value, perhaps it would be more proper to say of less dignity, than estates for life; estates for life being freeholds, and for years but chattels, and regarded as part of the personal estate, and cast upon the executor." * * * The common law upon the subject has not been changed by our statutes. The provision of section 1113 of the Civil Code that only certain enumerated covenants shall be implied in transfers of property is expressly limited to a conveyance by which "an estate of inheritance or fee simple is to be passed"; and by section 765 the common-law distinction between freehold estates and estates for years is followed, and it is declared that "estates for years are chattels real." The same distinction is to be found in section 14, and in sections 657–663 of the same Code. There is a marked difference between things real, and an interest or *estate* in things real. "The nature of the thing itself, therefore, does not determine the character of any particular estate that may exist in it, whether personal or real, but the extent and duration of the estate." 2 Cooley Bl. p. 15, note 1.' In short, at common law an estate for life, even though imposed upon an estate for years, was regarded as a freehold and as real property. But an estate for years, even for 'a thousand years is only a chattel, and reckoned part of the personal estate' (Jeffers v. Easton, Eldridge & Co., supra), and this common-law distinction has been maintained in this state.

"The case of Wilson v. Earp, supra, in so far as it differs with the principles herein announced, cannot be followed."

[4-6] Although we are in accord with the conclusion of the District Court of Appeal holding that the two leases which provide for a definite term of years were not included within the term, "real estate," we are of the opinion that the two leases which provide in addition to the definite fixed term specified that the leases are to continue "so long thereafter as oil or gas or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save" are included in the term, "real estate." It follows logically that if the legal interest created by oil and gas leases which provide for a definite term of years, being classified as estates for years at common law, are deemed to be personal property and are therefore excluded from the definition of "'real estate' as used in subdivision 5, § 1624 Civil Code," that the legal interest created by oil and gas leases which provide for a term of indefinite and uncertain duration, which under the common law are classified as freehold estates in the nature of a qualified or determinable fee, must be deemed to be real property and therefore included in the definition of real estate as used in said section.

In the case of Callahan v. Martin, 43 P. (2d) 788, 794, this court recently discussed in detail the nature of the property right created by a lease for production, and it was held that an operating lessee under a lease for a term of years, or for a term of years and so long as oil or gas should be

produced in paying quantities, was an interest or estate in real property in the nature of a profit a prendre which is an incorporeal hereditament. It was further held: "Under the usual oil and gas lease, the owner-lessor transfers to his lessee his right to drill for and produce oil and other substances. The rights of the lessee present a clear case of a profit a prendre in gross, a right to remove a part of the substance of the land. * * * This profit à prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real *if it is to endure for years.*" (Italics ours.) (Citing authorities.) And in Dabney-Johnson Oil Corporation v. Walden (Cal.Sup.) 52 P.(2d) 237, 243, the court continued the discussion, saying: "This profit à prendre, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real. * * * *Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate.*" (Italics ours.)

The leases which were the subject of sale by the licensed real estate salesman acting under respondent real estate broker are not in the record by reason of the fact that it was stipulated at the trial of the case that it was not necessary for them to be introduced in evidence, both parties agreeing that they were the "usual" oil and gas leases. In our examination into the question of the provisions ordinarily included in "usual" oil and gas leases, it has developed that there are an unusual variety of "usual" oil and gas leases. The record does not even disclose with certainty whether or not the "thereafter" clause is identical in both the leases containing the "thereafter" clause herein involved. It appears that there is a decided lack of uniformity of expression in the "thereafter" clause as found in the usual oil and gas leases. A lease may provide for the continuance of the lease after a definite period as long as oil or gas are found, discovered, obtained, or produced, using these words singularly or in combination, and such oil and gas leases generally have the added requirement that the finding, discovering, or obtaining, or producing be in paying quantities. Summers, Oil and Gas, § 85, p. 293. This lack of uniformity of expression in the "thereafter" clauses, however, is not material to the correct solution of the problem of the nature of the estate created and conveyed by leases containing such clauses, since in any event, whether the lease be terminated by a failure to find, discover, obtain, or produce oil or gas in paying quantities, the date of such termination, at the time of the execution of the lease, could not be definitely determined, and the duration of the term of such leases is therefore necessarily uncertain. The estates created by such leases are freehold estates in the nature of determinable fees. In this conclusion we are supported by ample authority from other jurisdictions. Bruner v. Hicks, 230 Ill. 536, 82 N.E. 888, 120 Am.St.Rep. 332; Poe v. Ulrey, 233 Ill. 56, 84 N.E. 46; Terry v. Humphreys et al., 27 N.M. 564, 203 P. 539; Leonard v. Prater (Tex.Com. App.) 36 S.W.(2d) 216, 86 A.L.R. 499.

Respondent concedes that had the phrase "for twenty years" been omitted, the lessee's estate would clearly have been of indeterminate duration. He argues that by the use of these words, "for twenty years" the parties intended to limit the term during which the lease should be binding on the lessee and to make the extended term optional rather than mandatory. It is his theory that after the expiration of the fixed term the lessee is to be regarded as having an estate which he can terminate at will, simply by failing to produce oil. This reasoning had its inception in the case of State v. South Penn Oil Co., 42 W. Va. 80, 102, 24 S.E. 688, 696, which held that the addition to the term of years of the clause "and as long as oil or gas may be found in paying quantities" did not give the lease such indefinite duration as to make the interest freehold in quantity. Respondent asserts that this state has accepted this view by reason of the fact that the holding in the above case was cited with approval in the case of Harvey Coal & Coke Co. v. Dillon, 59 W.Va. 605, 53 S.E. 928, 6 L.R.A. (N.S) 628, which in turn was cited as authority in the case of Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L.R.A. (N.S.) 211. The citation from the case of State v. South Penn Oil Co., supra, is as follows: "Nor does the addition to the term of years of the clause 'and as long as oil or gas may be found in paying quantities' give it such indefinite duration as makes the interest freehold in quantity; for, after the expiration of the term prescribed, * * * the lessee, having the option to continue to pump if he can find oil in paying quantities, becomes a

tenant at will, which may become a tenancy from year to year on the terms of the lease, but is not a freehold, because its extension after the end of the term prescribed depends upon his own act, the exercise of his own will; so, according to the terms of the instrument, that is as large an interest as the words will bear. Such superadded possibility of extended duration constitutes no part of the term of years prescribed, but is a new interest, in the nature of an option to become tenant at will or from year to year, by the exercise of his own volition when the fixed term of years shall have expired."

We do not agree with this analysis of the effect of the inclusion of a "thereafter" clause in an oil and gas lease. The solution of the problem as to what is the nature of the interest or estate created by such instruments may be arrived at by a consideration of just exactly what is implied by the provision for a fixed term, with the further provision that the lessee's interest shall continue so long thereafter as oil or gas is produced. Obviously the lease is divided as to duration into two parts, the definite term, commonly called the exploratory period, and the indefinite term, beyond the exploratory period, for which the lease may be extended by production. The "thereafter" clause prescribes the condition of fact which must exist within or at the end of the exploratory period of the lease upon which the lease may be continued beyond the definite term, as well as the conditions which must exist after the end of the exploratory period upon which the lease may continue indefinitely. In other words, during the definite fixed term, the lessee must complete its exploratory work [except in very exceptional cases when for some equitable reason the definite term may be extended] and having discovered and produced oil upon the leased premises within the definite fixed term must continue such production during the remainder of the fixed term in order to be entitled to continue the lease thereafter, and may continue as lessee thereafter only so long as production is continued. It is thus apparent that there are in fact two periods of time provided for by the habendum clause in such leases; the definite fixed term for exploration and discovery which vests immediately upon the execution of the lease and terminates in the absence of earlier forfeiture at the expiration of the definite fixed term, and, secondly, the indefinite period for production which likewise vests immediately upon the execution of the lease and continues until oil or gas is no longer produced.

The doctrine that the lessee's interest is inchoate and does not vest until the discovery or production of oil or gas was expressly repudiated in the recent case of Callahan v. Martin (Cal.Sup.) 43 P.(2d) 788. It is true that the *physical power* to produce oil or gas does not come into being until the time that a well is drilled and oil or gas is obtained therefrom, but the *right or privilege* to produce undoubtedly vests upon the execution of the lease. This indefinite term to produce oil or gas conveyed by the lease, vesting, at the execution of the lease and continuing thereafter so long as oil or gas is produced, is subject to the possibility of termination at any time either by failure to discover oil at all upon the premises, the exhaustion of oil and gas prior to the end of the definite term, or the exhaustion of oil and gas subsequent to the end of the definite period set out in the lease. It is this possibility of termination which renders the term uncertain. We thus have conveyed in the same instrument a definite term for exploration and an indefinite term for production. It is self-evident that the main purpose of oil and gas leases is to produce or gas in paying quantities and that the provision to explore is subsidiary to this primary purpose. This being so, we think that the duration of this primary right to produce oil or gas for an indefinite period gives character to the instrument as providing for a term of indefinite duration.

It may be that the leases contain some provision, and they probably do, such as a surrender clause, whereby the lessee may rid himself of the liabilities and duties accruing under the lease by virtue of his covenants to explore, drill, continue production, etc. By means of such added provisions it is probable that the lessee may divest himself at any time during the fixed term or thereafter of any interest in the lease, but such possibility arises solely from these added provisions. We are not willing to concede that the lessee may, in the absence of such special provisions, simply by deciding not to continue production, exercise an option to not accept a renewal of the lease after the expiration of the definite term. See South Penn Oil Co. v. Snodgrass, 71 W.Va. 438, 76 S.E. 961, 43 L.R.A. (N.S.) 848. We are likewise un-

willing to grant that the mere fact that the lessee by reason of such added provisions may terminate the lease at any time converts the estate granted into a tenancy at will. The lessor could not at his will terminate the estate granted by the habendum clause providing for a fixed definite term and so long thereafter as oil and gas is produced. Rich v. Doneghey, 71 Okl. 204, 177 P. 86, see note, 3 A.L.R. 378.

It is true that in the case of Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L.R.A. (N.S.) 211, supra, the case of Harvey Coal & Coke Co. v. Dillon, and "cases there cited" were cited as authority which included the case of State v. South Penn Oil Co., supra. It is to be noted, however, that this citation of authority is thrice removed, and, moreover, that the question involved in this case with reference to the quantity of estate created by an oil and gas lease containing a "thereafter clause" was not involved, the main question in that opinion being whether or not an oil lease could be assessed and taxed severally and separately from the real estate of the landlord. In any event, we are not now satisfied that the reasoning therein employed is correct.

It should also be noted that the cases cited by respondent in support of his argument that California has heretofore adopted the position that leases containing "thereafter" clauses are only estates for years are cases in which the leases under consideration were leases for a definite fixed term and did not contain "thereafter" clauses. See Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094, and Barr Lumber Co. v. Perkins, 214 Cal. 531, 6 P.(2d) 948. The case of Moore v. Heron, 108 Cal.App. 705, 292 P. 136, did not involve the construction of an oil and gas lease, but involved the question of whether or not one who had an option to secure an oil and gas lease provided certain exploratory work was done, could compel the lessor to specifically perform such an agreement to execute an oil and gas lease. The question here under consideration was not even remotely in question therein, and although some phrases extracted therefrom may seem to uphold one view, other phrases would equally well uphold the opposite view. It has no value as authority upon the problem here presented.

Although, as before stated, the leases which were the subject-matter of the sale by the real estate salesman are not in the record we have proceeded upon the assumption that the "thereafter" clause controls the duration of the leases. Since, according to the great weight of authority, the term clause which is the habendum clause dominates the period for which the lease shall run, it is hardly probable that there is included in the two oil and gas leases containing the "thereafter" clause under consideration here any provision that would compel a conclusion different from the one we have arrived at in our discussion of the "thereafter" clauses, i. e., that the estate was a freehold estate in the nature of a determinable fee. But in view of the fact that the nature of the interests created by any lease must be determined by an analysis of the instrument as a whole, which requires a consideration of all the provisions contained therein, we do not wish to go so far as to irrevocably hold that the leases herein involved create freehold estates, but simply hold that, in the absence of other provisions which might perhaps compel a different conclusion, the habendum clause used in such leases creates a freehold estate and therefore requires a reversal of the judgment.

[7] It should also perhaps be pointed out that, inasmuch as the case was tried in the lower court upon the theory that the leases were all classifiable in the same category of property interest and no distinction was made between the leases providing for a definite term which we have held to be chattels real, and not real estate, and those containing the "thereafter" clause providing for indefinite terms, which we have held to be determinable fees, and real estate, the evidence introduced relative to the agreement was not directed to the question of whether or not the agreement of employment was indivisible or severable. If it is severable the plaintiff may recover for the proper proportion of fees for the sale of the leases providing for a definite term and for the sale of the personal property; if it is not severable, plaintiff will not be entitled to any recovery. This is a question which will probably arise upon the new trial.

The District Court of Appeal correctly disposed of the two contentions made by appellant with reference to the recovery by plaintiff as real estate broker for work performed as salesman by Mr. Doak. Said portion of the opinion is as follows:

[8] "Appellant urges further that at the time the oral contract in question was made, he did not know that Doak, the salesman, was working for respondent Dabney. At the time of the trial, counsel for the parties stipulated: 'Mr. Doak, in January, 1929, was a licensed real estate salesman under Walter Dabney, the plaintiff, who was a duly licensed broker under the Real Estate Act of that time.' The foregoing stipulation amply supports the finding of the court that Doak was in fact the agent of respondent Dabney.

[9] "Appellant further urges that, since he did not know that Dabney was the principal of Doak, Dabney should not be permitted to recover the commission involved as an undisclosed principal. The right of an undisclosed principal to recover, however, is too well established to be open to question. Satisfaction Title, etc., Co. v. York, 54 Colo. 566, 131 P. 444."

Judgment is reversed.



5 Cal.2d 188

PEOPLE v. ONE HARLEY-DAVIDSON MOTORCYCLE, MOTOR NO. 32VL1807.

S. F. 15486.

Supreme Court of California.

Jan. 23, 1936.

Forfeitures ⇐5

Inquiry by conditional seller of motorcycle used in illegal transportation of drugs at buyer's place of employment to ascertain whether buyer was there employed *held* not reasonable investigation of buyer's responsibility, character, and reputation required to preclude forfeiture of seller's rights in motorcycle (St.1933, p. 788, § 15 (e).

CONREY and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Forfeiture proceeding by the People against one Harley-Davidson motorcycle, motor number 32VL1807, to which Dudley Perkins filed a claim. Judgment for claimant, and the People appeal.

Reversed.

For prior opinion, see 45 P.(2d) 244.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

John O'Donnell, of San Francisco, for respondent.

WASTE, Chief Justice.

The State Narcotic Act, § 15 (St. 1929, p. 388, § 15, as amended by St. 1933, p. 788), provides for the seizure and forfeiture of vehicles used to transport drugs. In this action it was alleged in the notice of seizure that the Harley-Davidson motorcycle had been unlawfully used in the transportation of narcotics. An answer was filed by one Dudley Perkins (hereinafter called "the claimant"), in which it was alleged the claimant had sold the motorcycle, a used machine, to a Chinese boy named Lee on a conditional sales contract, the terms and payments of which had not been completed, and therefore the claimant was entitled to a lien on the vehicle.

The act provides [section 15 (e), in part]: "The claimant of any right, title or interest in said vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the responsibility, character and reputation of the offender and without any knowledge that the vehicle was being, or was to be, used for the illegal transportation of such drugs."

The trial court found that the sales contract was bona fide, entered into after a reasonable investigation, and gave judgment for the claimant and ordered the release of the motorcycle. The people have appealed.

The primary contention on the appeal is that the claimant did not make sufficient proof that a reasonable investigation was made by the claimant as to the responsibility, character, and reputation of the offender Lee before selling the motorcycle to the latter on the conditional contract. The only evidence on that point is that the claimant asked and obtained from Lee the names of three references, one of them a seventeen year old Chinese boy, another of the names being that of the Chinese firm by whom Lee was employed. The claimant sent an assistant to the place of busi-

ness of this firm, and ascertained (so far as the record shows) only the fact that Lee was there employed. No other inquiries were made or information sought. To the argument of respondent that many similar sales are made without the exercise of an equally, and perhaps with even a less, reasonable degree of care, an answer seems to be that the statute requires that a greater showing must be made by one who may be called upon to defend against the law relating to seizure and forfeiture of vehicles used in violation of the salutary provisions of the Narcotic Act. It does not appear that the claimant knew or had any knowledge of Lee before he appeared at claimant's place of business and sought to buy the motorcycle. The evidence as to efforts to check on the whereabouts and activities of Lee, made when he was found to be an offender, most strongly indicate that the seller of the motorcycle would not, as a reasonably prudent man, have entered into the contract if he had sought any reliable information about Lee. Under these circumstances, it cannot be said that one inquiry at Lee's place of employment to ascertain if he was there employed measures up to the *reasonable investigation of the responsibility, character, and reputation of the offender* required by the act. The claimant did not prove his right to the lien.

A second contention of the people is that the court erred in ordering the return of the motorcycle to the claimant; that it should have been sold, the amount due to claimant being less than the value of the vehicle. Narcotic Act, § 15 (f). The evidence addressed to the value of the used motorcycle is weak, consisting only (in effect) of subtracting the amount paid from the face value of the contract. However, as claimant has not proved the matters required by the act in relation to the contract, the second contention becomes immaterial. He is not entitled to any relief in the action.

The judgment is reversed.

We concur: CURTIS, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.

CONREY, Justice (dissenting).

I dissent. It is conceded that the only defect in the claimant's investigation related to the responsibility, character, and reputation of the purchaser of the machine; in other words, his moral responsibility. The statute, State Narcotic Act, § 15 (e), Deering's 1933 Supp., Act 5323, is not an act regulating sales of personal property other than the dangerous substances covered by the title. A motorcycle, like a horse and buggy, is an ordinary subject of merchandise. The statute does not say that there must be an investigation of moral character before one may sell a motorcycle or other vehicle to a proposed purchaser. I can see no good reason for reading into the statute a meaning which its words have not expressed or for giving to the statute a construction which easily may operate so as to destroy rights of property held honestly and in good faith. Moreover, in this case the implied finding of the trial court is that the claimant did make a reasonable investigation of the responsibility, character, and reputation of the purchaser before selling the motorcycle. Since there is evidence that some investigation was made, although not particularly directed to the question of moral character, I think there is no good reason for reversal by this court of the trial court's decision.

I concur: LANGDON, J.

5 Cal.2d 274

KELLY v. LONGAN et al.

S. F. 15363.

Supreme Court of California.

Jan. 30, 1936.

Rehearing Denied Feb. 27, 1936.

1. Limitation of actions ⇐100(11)

Action against officers of corporation by subordinate employee for fraud in procuring loan to corporation on promise to repay loan and give employee stock bonus contrary to Corporate Securities Act *held* barred by limitations, where not commenced until nearly four years after failure of corporation to repay loan as promised, notwithstanding confidential relationship between employee and officer of corporation (St.1917, p. 673, as amended; Code Civ.Proc. § 338, subd. 4).

2. Limitation of actions ⇐177(3)

In action for fraud commenced more than three years after perpetration thereof,

plaintiff is held to stringent rules of pleading and evidence (Code Civ.Proc. § 338, subd. 4).

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by James Kelly against Patrick M. Longan and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

John J. McMahon and Patrick J. Murphy, both of San Francisco, for appellant.

Arthur R. Smiley and Bertram L. Linz, both of Los Angeles, for respondents Patrick M. and John M. Longan.

Luther Elkins, of San Francisco, in pro. per.

WASTE, Chief Justice.

This action is one to recover from respondents actual and exemplary damages for fraud, and for other relief. Demurrers to the amended complaint were sustained, the order not granting leave to amend. Motion to be permitted to file a second amended complaint was denied on the ground, as recited by the court in the judgment, that the proposed amended pleading contained no material allegations not contained in plaintiff's first amended complaint. The court also found in its judgment that it appeared in both the first and second amended complaints that plaintiff had actual and full notice and knowledge more than three years before he filed the complaint in the action, of the alleged fraud and the alleged fraudulent representations and promises of the defendants, and that from affidavits filed in the action it appeared impossible for plaintiff to amend the first amended complaint so as to toll the statute of limitations pleaded by the defendants in their demurrers. The court therefore refused permission to file the second amended complaint, and entered judgment that plaintiff take nothing and the defendants have their costs. Plaintiff appeals.

The respondents are alleged to have fraudulently obtained from appellant sums aggregating $55,936.21, either advanced or guaranteed to the Western Export Corporation (a Nevada corporation), which respondents controlled and to which they were heavily indebted, the corporation being insolvent. Appellant was a subordinate employee, having implicit trust and confidence in his employer, the respondent Patrick M. Longan. Between them there was a confidential relationship. It is alleged that appellant was promised a "bonus" of 16,666 shares of the corporation, contrary to the Corporate Securities Act (St. 1917, p. 673 as amended), and it was agreed that he would be indemnified and held harmless from any liability as a stockholder; that respondents made him believe that as a stockholder he was not only liable for existing debts of the corporation, but was personally liable as a stockholder to the respondents in a sum in excess of what they had procured from him. Respondents thereby secured releases and discharges of their own liability from appellant. None of the representations nor promises was made good. Appellant first discovered the truth of the situation in 1928, and commenced action in 1932, pleading the reason for not sooner discovering the fraud practiced upon him.

The demurrers were interposed on the ground that the statute of limitations had run against the cause of action; that the complaint did not state sufficient facts; improper joinder of causes of action; causes of action not separately stated; another action pending between the same parties for the same cause; and specially, on seventeen grounds, that the complaint was uncertain, ambiguous, and unintelligible. The ground of demurrer requiring our attention is that relating to the bar of the statute of limitations. The action should have been brought within three years after the discovery by plaintiff of the facts constituting the fraud. Code Civ.Proc. § 338, subd. 4. It was filed March 8, 1932. On November 22, 1927, appellant, at the instance of respondents, loaned to the Western Export Corporation the first large sum of money on its promissory note to be repaid on or before March 20, 1928. Within a few months, he had loaned to, or had guaranteed indebtedness of, the corporation, amounts in excess of $50,000. None of the sums were, or have been, repaid, and none of the obligations were, or have been, met. Appellant, on July 18, 1928, had to pay in cash on his guaranty to the Pacific National Bank of San Francisco the sum of $24,000. Neither the Western Export Corporation nor the respondents paid this amount or other sum, although they promised to do so, and it is alleged that it was only on these promises that appellant con-

sented to and made the loans and executed the guaranty. In the meantime, the Western Export Corporation was adjudicated a bankrupt.

[1, 2] By way of excuse for not having filed the complaint for nearly four years after the happening of all these events, appellant pleads that he is a man of little education, unversed in either business or finance; that he had been long associated with Patrick M. Longan, one of the respondents, as an employee, and because of this close relationship with Longan he had for him a "most profound respect and confidence." There are other allegations tending to substantiate this relationship. Viewed as a whole, the excuse offered by appellant for not bringing the action within the statutory time is not sufficient to toll the statute. The rule is that, in actions for fraud commenced more than three years after the perpetration of the fraud, the plaintiff is held to stringent rules of pleading and evidence. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 702, 16 P.(2d) 268; Haley v. Santa Fe Land Imp. Co., 5 Cal.App.(2d) 415, 42 P.(2d) 1078. There is not here that full and complete showing of the times and circumstances under which the facts constituting the fraud were brought to plaintiff's knowledge necessary to enable the court to determine that the facts were, for good reason shown, not discovered before the three-year period. They were, in fact, brought home to the plaintiff's knowledge and notice nearly four years before action was brought. Thereafter, the plaintiff continued to rely on the promises and representations made by the respondents, supported, no doubt, by an erroneous and misplaced confidence in the integrity of the promisors. Unhappily, that is not sufficient to toll the statute in the present case.

The judgment is affirmed.

We concur: CONREY, J.; THOMPSON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

LANGDON, Justice (dissenting).

I dissent. The complaint alleges the perpetration of a gross fraud upon plaintiff, by the deliberate acts and representations of a person in whom he reposed his fullest confidence. The circumstances alleged are so aggravated that rules of pleading should be given their appropriate liberal application in order to prevent a possible serious miscarriage of justice. The case of Original Mining & Milling Co. v. Casad, 210 Cal. 71, 290 P. 456, arising under somewhat similar facts, fully sustains the sufficiency of the complaint herein.

The plaintiff is denied relief because he has assertedly not alleged circumstances showing and excusing his failure to discover the fraud at an earlier date. But the complaint does allege these circumstances, and upon a fair consideration of the allegations the failure to bring the action sooner is entirely understandable and justifiable. Plaintiff, an uneducated man unfamiliar with business, was favored with the friendship of defendant Patrick Longan, a rich and socially prominent business man, for years prior to the transaction in question. The latter acted as his confidential adviser and was intrusted with his affairs. The said defendant promised to indemnify plaintiff and hold him harmless from any loss arising out of the transaction. Plaintiff relied upon Longan when the original fraudulent representations were made to him; was it not natural for him to rely upon Longan when this later fraudulent promise was made? To a person such as plaintiff, there were no facts or circumstances tending to arouse suspicion until the latter part of 1929, when he was ousted from his position with defendant's company. He then first conceived of the deception by his trusted adviser and immediately employed counsel, investigated the transaction, and brought this suit.

If plaintiff can prove these allegations he is undoubtedly entitled to a judgment. I am satisfied that he should be given the opportunity to do so.

11 Cal.App.2d 337

ROLAPP et al. v. FEDERAL BUILDING & LOAN ASS'N et al.

Civ. 9996.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1936.

Rehearing Denied Feb. 20, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Action ⇐6

Court had jurisdiction of action for declaratory relief by party to whom loans were to be made by defendant progressively as building was being erected, to determine future liability of defendant who had repeatedly repudiated contract, where declaration of present rights depended on such determination (Code Civ.Proc. § 1060 et seq.).

2. Action ⇐6

Where pleading and proof of plaintiff in action for declaratory relief put in issue present rights of parties and future contingencies under progressive contract repeatedly repudiated by defendant, court properly determined rights of parties on occurrence or nonoccurrence of future events (Code Civ.Proc. § 1060 et seq.).

3. Pleading ⇐193(6)

Whether action for declaratory relief may be joined with straight action for equitable relief is question to be raised on demurrer for misjoinder and is not one affecting jurisdiction (Code Civ.Proc. §§ 1060, 1062).

4. Equity ⇐39(1)

Court of equity, having obtained jurisdiction of parties and of subject-matter, will seek to administer complete relief, particularly with respect to enforcement of its decrees against delinquent defendant.

5. Judgment ⇐622(2)

Failure to set up as counterclaim in former action claim existing at that time *held* to preclude defendant from being reimbursed on such claim in subsequent action (Code Civ. Proc. § 439).

6. Interest ⇐10

Defendant repudiating contract to loan money as building progressed *held* not entitled to interest on whole sum on theory that such sum had been set aside for benefit of borrower, since party should not be permitted to benefit from his own wrong.

7. Damages ⇐72

Defendant *held* not entitled to be reimbursed for attorney's fees incurred in defense of former action on contract, where such action was made necessary by its repudiation of contract.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Suit by F. H. Rolapp and others against the Federal Building & Loan Association and another, wherein defendant filed a cross-complaint. Decree for plaintiffs, and named defendant appeals.

Decree modified, and, as so modified, affirmed.

Meserve, Mumper, Hughes & Robertson and Lee E. Anderson, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Irl D. Brett, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

In an action for declaratory relief plaintiff had judgment, and the defendant Federal Building & Loan Association has appealed on a bill of exceptions.

On May 15, 1930, the appellant received from one Dery his promissory note in the sum of $6,500 secured by a deed of trust upon certain real property. On the same day these parties entered into a "building loan" contract whereby the association agreed to loan Dery separate sums equal in all to the face of the note progressively as a building was erected on the premises. After these papers were executed, and after the work on the building had been started, it was discovered that the property was community, and the association refused to recognize the contract because the wife of Dery had not signed any of the papers. Dery procured a grant deed from his wife for the purpose of clearing the title, and thereafter tendered to the appellant a policy of title insurance which appellant refused to accept. Dery then deeded all his interest to Male, and also assigned to him all his interest in the building loan contract. In October, 1930, Male commenced an action against this appellant and others and had judgment, declaring that the association had waived any right to rescind by reason of the misrepresentations of Dery, that the trust deed executed by Dery was a valid and subsisting first incumbrance, that Male was not in default because the association had shown an intention not to recognize the contract, and that Male was entitled to recover the amount of the first installment due under the contract, to perform and

carry on the obligations under the contract, and to receive the future progress payments. The appellant paid the amount of the first installment adjudged to be due, but in all other respects refused to abide by the judgment. Male assigned all his interest in the judgment and under the contract to Rolapp, who commenced this action for declaratory relief and for such other equitable relief as should be found proper. This judgment reaffirms the contract and determines the rights of the respective parties under it. It also requires the appellant to deposit with the court the promissory note and the deed of trust, restrains a transfer of the note without written notification of the terms of the judgment, and provides for a cancellation of the note, deed, and building contract in the event of default of either party, and under circumstances specified in the judgment.

[1] Appellant states the principal question involved to be the jurisdiction of the court to determine the respective rights of the parties on the occurrence or nonoccurrence of future events. The argument is that the declaratory relief statute (section 1060 et seq., Code Civ.Proc.) provides for the determination only of an actual controversy in relation to facts then existing. Respondent concedes the general statement, but relies on the settled exception that such future rights may be determined when a declaration of the present and actual controversy is dependent upon a determination of such future rights. Briefly, the appellant here has contended that the assignee had no rights under the building contract because the contract was terminated by reason of nonperformance, but that the note and trust deed were, nevertheless, existing and valid obligations which appellant could enforce. The respondent has contended that the building contract was an existing obligation which he could enforce according to its original tenor, but that he was unable to perform his obligations under it unless and until the future liabilities of the appellant were declared and determined. There is no controversy between the parties as to the facts, and these facts, as stated, fully bring the case within the exception to the rule. Discussions and citations on the general principles involved are found in 12 A.L.R. p. 69; 50 A.L.R. p. 47, and 87 A.L.R. p. 1216.

[2] In criticizing the application of the exception to the rule as applied to the facts of this case, appellant's argument is that, since these contingencies might not arise, there is no "actual controversy"; hence no jurisdiction for a determination in this proceeding. But the actual controversy concerns a progressive contract which in itself contemplates these future contingencies, and the present rights and liabilities of the parties could not be finally determined without a consideration of what might occur in its operation. The court did not write a new contract for the parties, but did endeavor to so interpret the present contract that it might be performed according to its original tenor without further litigation. The pleadings clearly put all these matters in issue, and the evidence supports the portions of the decree under attack. The *necessity* for the determination was thus a matter in the discretion of the trial court. In view of the prior litigation and the repeated repudiations of the contract by the appellant—not alone of the terms calling for present performance, but of these future contingencies which are now under attack—we cannot say that such discretion has been abused. Appellant lays stress upon the ruling in City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475, 496, where it was held error for the court to give its determination to matters beyond that of the existing controversy over present rights. But it will be noted that this ruling was placed squarely on the ground that the plaintiff had "neither pleaded nor attempted to prove any facts which would entitle it to any other or affirmative relief" beyond a declaration of the present actual controversy.

[3] Basing its argument on the same premise, the appellant argues that the trial court was without jurisdiction to grant equitable relief beyond a mere determination of the rights and duties of the parties arising out of the controversy. Specifically, it complains of those portions of the decree which require it to deposit the promissory note and trust deed with the clerk of the court and which restrains appellant from making an unconditional transfer of the note without written notice to the transferee of the infirmities arising out of the judgment. On this issue as well there is no failure of pleading or proof. The question is therefore answered by the settled doctrines covering all cases in equity. The action under the Code is itself an equitable proceeding. Section 1062 expressly declares that the reme-

dies therein provided are cumulative and shall not restrict any other remedy. Section 1060 declares the remedy is available "whether or not further relief *is* or could be claimed at the time." There is nothing in the Code which limits the plaintiff to the one remedy or which prevents its joinder with a straight action for equitable relief. Furthermore, if the point were debatable, it is a question to be raised on a demurrer for misjoinder and is not one affecting the jurisdiction.

[4] Entertaining these views, we have no difficulty in holding that, since the pleading and proof supported the body of the decree, it was proper to require the deposit of the note and to enjoin an unconditional transfer in order to prevent future litigation and to make the declaratory order effective. This follows the settled rule that, when a court of equity has obtained jurisdiction of the parties and of the subject-matter, it will seek to administer complete relief, particularly with respect to finding the means of enforcing its decrees against a delinquent defendant. 10 Cal.Jur. p. 559; 21 Cor.Jur. p. 134.

Appellant criticizes the conclusion of the trial court that the judgment against it in the former action brought by plaintiffs' assignor was res judicata. The argument is not persuasive as showing either error or prejudice. Manifestly, if the interpretation which the trial court gave the contract is correct, it is of no consequence whether the former judgment is binding or not, since the judgment appealed from was not based upon that ground.

[5-7] The trial court held that the appellant was not entitled to interest on the unpaid portion of the loan prior to October 24, 1931, and was not entitled to be reimbursed for attorneys' fees incurred in the defense of the former action. The holding was sound as to both items. If appellant had a valid claim for either charge, it existed when the complaint in the former action was filed; not having set up its counterclaim at that time, it must be deemed to have waived it. Section 439, Code Civ. Proc. But the claim for interest was not a valid claim. Appellant was obligated to pay out the money as the building progressed, and interest was due only on sums so advanced. Appellant repudiated its contract to pay any portion of the sum. It claimed the right to demand interest on the whole sum on the theory that it had "set aside" that sum for the benefit of the respondent. Such a claim can be supported only on the theory that a party should be permitted to benefit from his own wrong. The claim for attorneys' fees is likewise without merit. The former suit was made necessary by appellant's repudiation of the contract alone.

The parties agree that there is an error in paragraph XV of the decree where the figures $6,000 appear and that these should read $6,500. The decree is therefore modified to that effect; but this could have been done without an appeal to this court.

The decree is affirmed as modified, with costs to respondent.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 528

SCHRAMM v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10620.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1936.

Stipulations ⇐17(2)

Where employee had filed petition to review Industrial Accident Commission's award because it failed to run against insurer as well as employer, insurer *held* entitled to file answer to petition, notwithstanding stipulation entered into by commission, employer, and employee that award should be annulled and cause remanded.

Petition by William Schramm for writ of review to annul an award of the Industrial Accident Commission, opposed by the Commission and others. On motion by the defendant the National Automobile Insurance Company for leave to file its separate answer to the petition for review.

Motion granted.

Hewitt & Anderson, of Los Angeles, for petitioner William Schramm.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

F. Britton McConnell and C. W. Bowers, both of Los Angeles, for respondent National Automobile Ins. Co.

HOUSER, Presiding Justice.

In this matter the question that is now submitted to this court for its determination arises from the facts that heretofore, pursuant to an application made by Orlie R. Blair to the Industrial Accident Commission to adjust his claim for compensation arising out of certain injuries alleged to have been sustained by him, an award was made in his favor and against his employer, William Schramm, only; thereby relieving from liability National Automobile Insurance Company, the alleged insurance carrier of said employer. A petition by Schramm for rehearing was denied. Thereafter Schramm presented to this court his petition for a writ of review as to said order. Following an answer thereto filed by the Industrial Accident Commission, by a stipulation in writing, signed by the respective parties to the proceeding, it was agreed that the award theretofore made by the Industrial Accident Commission be annulled and that the cause be remanded for further proceedings by said commission. Thereupon, and before any order had been made by this court with respect to said stipulation, National Automobile Insurance Company, the alleged insurance carrier of Schramm, presented its objection to the entry by this court of its order in accord with the terms of said stipulation. At the same time National Automobile Insurance Company requested leave of this court to file its separate answer to the said petition for review of the award.

It is obvious that, aside from any possible pride that the Industrial Accident Commission originally may have had in having its award affirmed, National Automobile Insurance Company has a pecuniary interest to the same effect. It may be that, in accordance with the rules of practice, no absolute right on the part of National Automobile Insurance Company to interfere in the matter obtains (a question which this court does not undertake to here decide); but, inasmuch as no prejudice may result either from a failure on the part of this court to enter its order by which, in accordance with the said stipulation, the award would be annulled, or, on the other hand, in permitting National Automobile Insurance Company to file its separate answer to the petition to review the award:

It is ordered that the said stipulation be disregarded by this court, and that within ten days from date hereof, if National Automobile Insurance Company be so advised, it file its separate answer to the petition for a writ of review herein.

We concur: YORK, J.; DORAN, J.



11 Cal.App.2d 297

WALKER v. NELSON et al.

Civ. 9653.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1936.

As Corrected Feb. 4, 1936.

1. Automobiles ⇐244(24, 32)

Evidence *held* to warrant jury's determination that father had right to control use of automobile registered in father's name as legal owner and of son as registered owner, and that son was operating automobile with father's permission at time of accident (St.1931, p. 2105, § 45¾; Civ.Code, § 1714¼).

2. Automobiles ⇐243(2)

Where personal injury action involved question whether father was owner of automobile registered in his name as legal owner and in son's name as registered owner and question whether son was using automobile with father's permission, refusing to permit evidence as to circumstances surrounding father's purchase of other automobiles *held* proper.

3. Trial ⇐296(3)

In personal injury action involving question whether father was owner of automobile driven by son, instruction regarding ownership *held* not reversible error because of omission of element of permissive use, in view of other instructions.

4. Trial ⇐295(1)

Instruction must be considered with other instructions in pari materia.

5. Trial ⇐296(3)

Instruction concerning correlative rights and duties of motorists respectively approaching intersection *held* not objectionable on ground that it failed to mention defense of contributory negligence, in view of further instructions amply covering contributory negligence.

6. Appeal and error ⇐1068(4)

Instructing that jury might consider in assessing damages question whether plaintiff's injuries might reasonably be expected to cause any mental worry in future *held* not reversible error, notwithstanding it had been stipulated during trial that plaintiff had fully recovered from broken arm, where verdict was not inordinate and as reduced by court was less than special damages proved.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jack Walker against Fred Nelson and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

R. G. Partridge and Ralph E. Bancroft, both of San Francisco, for appellants.

W. A. Lahanier, of San Francisco, for respondent.

McNUTT, Justice pro tem.

Plaintiff sued defendants Fred Nelson and N. J. Nelson (as John Doe) for damages for personal injuries alleged to have been caused him by an automobile while it was being negligently operated by Fred Nelson with the permission of the owner N. J. Nelson (John Doe). A jury returned a verdict of $3,250 which the court reduced to $2,000 and plaintiff filing partial satisfaction defendants appealed from the judgment entered on verdict after denial of motion for new trial.

Before taking up and answering seriatim the six questions which appellants contend are involved and illustrate alleged error of the trial court a word as to the background of the case is necessary that the answers to these questions may be better understood.

The plaintiff was driving one car, the defendant Fred Nelson another, and a collision of the two cars caused the injuries complained of. In the complaint it is alleged, paragraph III, "That at all times mentioned herein, the defendants (Fred Nelson, John Doe and Richard Roe) owned and operated a certain Ford sedan, automobile, bearing 1932 California State license No. 2 H 77 57.

"IV. That at all times mentioned herein, the defendant, Fred Nelson, was driving and operating said Ford automobile with the consent of John Doe and Richard Roe, defendants."

The answer of Fred Nelson admits, by failure to deny, the allegations of said paragraphs III and IV. N. J. Nelson sued as "John Doe" by answer likewise admitted the said allegations of the complaint in his original answer. Defendant N. J. Nelson is the father of Fred Nelson. Except when the son was in Berkeley at college he lived with his parents in San Francisco. Apart from testimony of witnesses addressed to the negligent operation of the automobile by the defendant driver, it was proved that Fred Nelson had pleaded guilty to the charge of reckless driving arising out of the accident, reduced from the charge of felony. It was further proved that at the time of the accident the car was covered by insurance. The original answer of the defendant's father was filed by an attorney for the insurance carrier. The defendants through other counsel filed an amended answer denying all of the allegations of plaintiff's complaint. Upon the trial of the cause the defendant N. J. Nelson's original answer was received in evidence as an admission by him of ownership of the car in question. The liability of the defendant son turned upon the negligent operation by him of the car, and of the defendant father upon ownership of said car and its permissive use by the son.

[1] We return to appellants' questions No. 1. "Is a father liable as owner under section 1714¼ of the Civil Code and section 45¾ of the California Vehicle Act [St.1923, p. 517, § 45¾, as added by St.1931, p. 2105] for injuries caused by the negligent operation of a car by a son where the father purchased the car when new for his son from a dealer for cash, and the dealer, without the knowledge of the father, mistakenly had the car registered in the name of the father as legal owner and the son as registered owner, the father at no time using or controlling the car?" The answer to this question is that there was evidence, which the jury appears to have believed, that the father was the owner of the automobile by reason of the admission of that fact in his answer. Next, that the evidence reveals that the father used the car at times and that

it was kept at all times in his garage. Next, that the jury was not forced to believe that the dealer had had the car mistakenly registered in the name of the father as legal owner and in that of the son as registered owner without the knowledge of the father, because, we repeat, the father admitted the ownership of the car. On the theory that the father was the owner of the car and that he contemplated or attempted to make a gift of the same to his son, he did not comply with the requirements of section 45¾ of the California Vehicle Act, and, hence, did not exculpate himself from liability because, if he were owner, there is no question but that he permitted the son to drive the car.

[2] Question No. 2. "Did the defendant, N. J. Nelson, suffer prejudicial error by reason of the refusal of the court to permit the defendants to show the circumstances surrounding the registration of the car by the dealer?" The answer to this question is that the court did not refuse to permit the defendants to show the circumstances surrounding the purchase of the car as the other evidence developed that Mr. and Mrs. Nelson, accompanied by their son, went to an automobile dealer where the father for cash bought the car in question. The court did, however, properly refuse to permit evidence as to the circumstances surrounding the purchase of other automobiles than the one involved in the accident.

Question No. 3. "Did the court err in giving an instruction containing the provisions of section 45¾ of the California Vehicle Act when the facts show the automobile was purchased new from a dealer?" The court did not err in giving an instruction containing the provisions of section 45¾ of the California Vehicle Act when the facts show that the automobile was purchased new from a dealer, because of the admission by the father that he owned the car. One who has owned an automobile which he gives, sells, or otherwise transfers to another must comply with that section of the act by immediately notifying the Division of Motor Vehicles of the transfer; provided, however, that in the event the notice is given, or in the event of failure to give the notice, an owner who has made a bona fide sale or transfer of the vehicle and delivered possession thereof to the purchaser, and who has properly indorsed the certificate of ownership, shall not by reason of the provisions of the act be deemed the owner so as to be subject to the liability provided by section 1714¼ of the Civil Code.

[3, 4] Question No. 4. "Was it error to instruct the jury that if they found from the evidence that the father bought the automobile for the son and paid for it and gave it to the son, and that thereafter he knew not at all that the automobile was registered in his name as legal owner, he was not liable, but if he did know about the registration of the car in his own name as legal owner, he was liable?" Such an instruction as a legal abstraction and isolated from other instructions is erroneous as it omits the element of permissive use, but the instruction must be considered with one almost in pari materia given at the request of the defendants which follows:

"Under the laws of this State, there is a presumption of law that every man obeys the law, and the presumption in this case is that the automobile being operated by the defendant Fred Nelson was being operated in a lawful manner. This presumption in itself is a species of evidence and it shall prevail upon and control your deliberations until and unless overcome by satisfactory evidence to the contrary.

"An owner of a motor vehicle is made responsible under the laws of this State for the negligent operation of his automobile by another person. In this case it is denied that defendant N. J. Nelson was in fact the owner of the automobile being driven by Fred Nelson, and it devolves upon you, members of the jury, to determine whether, in fact, he was the owner thereof. In arriving at your conclusion in this regard, you are instructed that the owner of a motor vehicle, in order to be liable as I have just explained it to you, must have, first, the right to possession of the automobile, and, second, must have the right to control its operation by other persons." And with one given at the request of plaintiff which follows:

"Every owner of a motor vehicle, excepting only the seller thereof under a conditional sales contract or chattel mortgagee is liable for the injury to a person resulting from negligence in the operation of such motor vehicle by any person using or operating the same with the permission, expressed or implied of such owner, provided however, such liability of such owner shall be limited to the amount prescribed in the statute.

"An owner of a motor vehicle is any person having the lawful use or control, or the right to the use or control of the motor vehicle for a period of ten or more consecutive days. * * *

"If you find that his father was not the owner of the machine but that Fred Nelson was guilty of negligence which alone was the contributing cause of the accident, then you will return your verdict against Fred Nelson alone and in favor of his father."

Again, it must be borne in mind considing the instructions complained of that the jury considered that the father knew better than anybody else who owned the automobile because he had purchased it and also admitted the ownership of it.

[5] Question No. 5. "Did the giving of an instruction which by its terms purported to settle the conditions necessary to the predication of a verdict and which omitted mention of the pleaded defense of contributory negligence constitute prejudicial error?" This question has to do with an instruction concerning correlative rights and duties of persons respectively approaching an intersection. The instruction complained of follows: "If you find that the intersection was clear up to the time that the plaintiff had crossed the westerly lateral curb lines of Divisadero Street and entered the intersection, then the plaintiff had a right to assume that any car approaching the intersection from any direction would yield the right-of-way to plaintiff." This instruction must be read in connection with the ample instructions given by the court upon the subject of contributory negligence as well with the instruction given on this specific subject with another instruction. "If you find from a preponderance of all the testimony in this case that the automobile was driven by defendant Fred Nelson with ordinary care and caution and had actually entered the intersection before the other approached it, he might assume, until the contrary reasonably appeared, if it did, that he would be given the right-of-way and be permitted to pass through the intersection without danger of collision. He had the right to assume that Walker, the driver of the other car would obey the law and yield the right of way, if slowing down were necessary to prevent a collision." Errors must be considered in the light of the circumstances in which they are committed and from a perusal of the evidence in this case it is obvious that not only no miscarriage of justice occurred, but it would savor of such to reverse the judgment. In August, 1931, defendants selected and purchased the car in question for which Nelson Senior paid the dealer in cash. The son was in Berkeley and the car was immediately taken to the father's garage. That the father had the right to use the car follows from the fact that he did use it and that he admitted its ownership. Its registration with the department showed N. J. Nelson as the legal owner and Fred Nelson as registered owner. This car was always under the father's control when the son was away. Since its purchase the license had been renewed under the same registration. It is true that this case is unique in that it presents a situation of the hybrid ownership of an automobile from which the jury may have inferred, as it had the right to do, that the father had the ownership put in himself in order that he might control the son's use of the car.

[6] Question No. 6. "Was it error to instruct the jury that it might take into consideration in connection with assessing damages the question as to whether or not the injuries sustained by plaintiff might reasonably be expected to cause any mental worry in the future when it was stipulated during the trial that the plaintiff had full recovery from a broken arm?" The court gave what may be designated as a "stock" instruction on measure of damages. It is obvious, however, that the jury was not misled thereby, and that the defendants suffered no substantial prejudice. The verdict of $3,250 was not inordinate and as the sum stands reduced is less than the special damages proved. Injuries were fractured radius and ulna, good union, consequent temporary muscle atrophy, the surgeon testifying it would take eight or nine months for the patient to have normal use of his arm.

To sum up, an insured car stands in the name of father as legal and of son registered owner, suit is brought and general ownership by the father is admitted. The insurance company attorney retires from the case, new counsel appear, a denial of ownership follows, but all the circumstances indicate that the jury was warranted in determining that the father had the right to control the use of the car by his son and that hence the son operated it with his permission.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, Acting P. J.

11 Cal.App.2d 379

SADIK v. WALLBERG MIN. CORPORATION.

Civ. 5378.

District Court of Appeal, Third District, California.

Jan. 22, 1936.

1. Master and servant ⇐80(9)
Evidence *held* to sustain findings for laborer suing for wages.

2. Appeal and error ⇐1010(1)
Appellate court cannot substitute its conclusion for trial judge's findings supported by sufficient evidence.

3. Pleading ⇐315
Great particularity in bill of particulars will not be required if information is within knowledge or available to one seeking bill, but it will be ordered when allegations are general or when information, although in possession of party seeking particulars, is unintelligible.

4. Trial ⇐395(1)
Finding that all of allegations contained in specific cause of action set forth in plaintiff's complaint were true *held* sufficient to support judgment.

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action by Jim Sadik against the Wallberg Mining Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. E. Ebert, of Marysville, and P. H. Johnson, of Sacramento, for appellant.

Rich, Weis & Carlin, of Marysville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1933 and 1934 defendant corporation operated a gold mine in Yuba county. Plaintiff, a laborer at the mine, brought this action to recover wages earned by himself while working for defendant as a miner, and also as assignee of seven others who likewise had been employed by defendant.

The complaint set forth these demands in the language of the common count, and the decision being in favor of plaintiff, findings and judgment followed. The findings are to the effect that all of the allegations contained in paragraphs 1, 2, 3, and 4 of the specific cause of action set forth in plaintiff's complaint were true.

Appellant urges for reversal that the evidence as well as the findings were insufficient to support the judgment, and the original and amended bills of particulars were likewise insufficient.

The evidence discloses that from July 1, 1933, to April 17, 1934, I. O. Wallberg was president of defendant mining corporation and in charge of the mine as general manager. During the same period of time Hazel Wallberg was vice president, a director, treasurer, and kept the books of the company and time records of the employees.

The several complainants testified in their own behalf that the defendant owed them the respective amounts sued for. They did not keep a record of their own account, as most of them were unable to read or write; but they relied upon Wallberg, who from time to time told them what was owing to them by the company as shown by the time book.

[1, 2] Upon cross-examination the testimony of the claimants and Wallberg was not always in accord as to the number of days worked or the rate of pay that each man was receiving, but that was a discrepancy to be weighed and considered by the trial court in reaching its conclusion, and there being evidence in the record to support the findings reached by the trial court, we cannot on appeal substitute our conclusion for that of the trial judge.

In regard to the bills of particulars, it appears from the testimony of Hazel Wallberg, the timekeeper during the time the men were employed, that she and S. P. Fogerty, who succeeded her as secretary and timekeeper, together prepared the bills from data revealed by the time book in the possession of defendant, and that the items there shown aggregated the amounts claimed by plaintiff and his assignees. Defendant objected to the first bill of particulars as furnished as not being in sufficient detail, and a further bill was requested and furnished, to which objection was also made, but it seems to be true that the time book was last seen by plaintiff in the mine office when he left the company, and was later found in the possession of the secretary, where Mrs. Wallberg testified she and her successor used this time book in getting the information to make out the bill of particulars.

[3] The rule in regard to supplying a bill of particulars is that great particularity will not be required if the information is within the knowledge or available to the one who seeks the bill, but nevertheless it will be ordered when the allegations of the pleader are general, as they were in this case, that the bill may aid the opposing party to know upon what specific demands or defense to prepare his pleading, or when the information, although in the possession of the party seeking the particulars, is unintelligible. 49 Cor.Jur. 640. Appellant objected to the findings under section 454 of the Code of Civil Procedure, but the trial court committed no error in overriding defendant's motion to exclude evidence at the trial.

[4] Defendant objects also to the findings, claiming that they constituted mere conclusions of law and were therefore insufficient to support the judgment. Findings by reference to pleadings or parts thereof have been frequently criticized by the appellate courts, but such findings have been upheld where they found that all the allegations of a complaint were true and the denials and allegations of the answers untrue. Lee v. Day, 55 Cal.App. 653, 203 P. 1024. This rule, although not to be commended, is supported by too strong an array of authority to be now overthrown. 24 Cal.Jur. 986.

The judgment should therefore be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



11 Cal.App.2d 355

GRIDER v. MANISERA et al.
SAME v. ADAMS.
Civ. 10783.

District Court of Appeal, Second District, Division 2, California.
Jan. 21, 1936.

1. Deeds ⇐211(3)
Evidence *held* to support judgment ordering return of property transferred by aged widow to daughter and granddaughter because of coercion and fraudulent representations of grantee.

2. Appeal and error ⇐1010(1)
Conclusions by fact finder will not be disturbed if supported by satisfactory evidence.

3. Deeds ⇐70(7)
Aged and enfeebled widow induced to transfer property to daughter and granddaughter without consideration to defeat claims of creditors *held* not in pari delicto with grantees so as to defeat right to recover property notwithstanding that transfer was made contrary to legal advice secured by widow.

4. Deeds ⇐70(2)
That independent advice was sought and given cannot validate deed secured by fraud and undue influence, but is circumstance to be considered in connection with other facts.

5. Deeds ⇐70(7)
Transfer by aged and enfeebled grantor of her property without consideration to her daughter and granddaughter will be carefully scrutinized by courts.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Consolidated suits by Zora A. Grider against Idella Manisera and another, and against Zora Lee Frances Adams. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ben C. Cohen and Leo Shapiro, both of Los Angeles, for appellants.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

In these two cases, consolidated for trial, plaintiff, an aged widow, recovered judgments for the return of certain properties which she had transferred to her daughter and granddaughter. The transfers were made, it was alleged, because of the coercion and insistence of the transferees and upon representations that if such conveyances were not made "other persons" would seize said properties. It was also alleged and found that said transferees promised to reconvey the properties to plaintiff upon demand, but had failed and refused so to do.

[1-4] No sufficient legal reason is shown to disturb the judgments of the trial court. Findings supported by ample and satisfactory evidence were in favor of plaintiff, and it is not our province to interfere with

the conclusions reached by the fact finder. Appellants urge, however, that respondent in fact alienated her property to hinder and embarrass creditors, and that she may not now be heard in a court of equity in an effort to recover that which had been fraudulently transferred to another. This equitable rule is a well recognized and widely applied one, but in the present actions the facts do not warrant invoking the principle in the manner contended for by appellants. In the first place, the issue of transfer in fraud of creditors was raised as a special defense, conflicting testimony on the point was presented, and the trial court specifically found that the properties were not conveyed to appellants with intent to hinder, delay or defraud respondent's creditors. Furthermore, respondent testified that representations as to loss of the properties to creditors or "other persons" were made by appellants themselves, and it was alleged that such representations were fraudulently made to induce respondent to make the transfers. Adopting the theory of appellants that the transfers were made for an improper purpose, yet the facts justify the conclusion that the parties were not in pari delicto, and that respondent, unduly influenced by false representations, should be afforded relief. See Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294, and cases there cited.

Nor is respondent's claim to be defeated by the fact that she procured independent advice from her attorney before making the transfers. Her legal adviser warned against the prospective alienation of her properties, but in spite of this and, as she claimed, at the insistence of her daughter and granddaughter, she executed and delivered the conveyances. It has been held that the mere fact that independent advice was sought and given cannot of itself validate a deed given where fraud and undue influence motivated the transfer, but is merely a circumstance to be considered by the court in connection with other facts. Fowler v. Enriquez, 56 Cal.App. 107, 204 P. 854.

[5] In view of the facts disclosed in this case—the advanced age of the grantor, her physical infirmities and mental enfeeblement; the fact that in these dealings she was transferring property without consideration to her own daughter and granddaughter (which of itself invites the careful scrutiny and consideration of the court [Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332])—we feel that the trial court acted well within its right in the exercise of its legal and equitable functions in restoring the properties to respondent.

Judgments affirmed.

We concur: WOOD, J.; CRAIL, P. J.



11 Cal.App.2d 428

COLDEN v. BROADWAY STATE BANK et al.

Civ. 9556.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1936.

Hearing Denied by Supreme Court March 23, 1936.

1. Pleading ⇐363

Disposition of plaintiff's motion to strike portions of complaint rests in sound discretion of trial court.

2. Pleading ⇐363

Refusal to grant plaintiff's motion to strike portions of complaint *held* not abuse of discretion, where complaint would not state cause of action with or without such portions.

3. Appeal and error ⇐419(1)

Statement in notice of appeal from judgment that appeal was also taken from all orders and rulings made by court in reference to judgment was superfluous.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by C. J. Colden against the Broadway State Bank, a banking corporation, and others. From the judgment, plaintiff appeals.

Affirmed.

Edwin J. Miller, of Los Angeles, for appellant.

Bicksler, Parke & Catlin, of Los Angeles, for respondents.

DORAN, Justice.

[1, 2] The decisive question involved in this appeal is whether the court abused its

discretion in refusing plaintiff's motion to strike out certain portions of the complaint. It is well settled that this question is one which addresses itself to the sound discretion of the trial court. There is nothing in the record which reveals that such discretion was abused. The complaint, with or without the portion sought to be stricken, would not state a cause of action. There was also no error under the circumstances in the granting of a nonsuit.

[3] Judgment is affirmed. The notice of appeal, in addition to the appeal from the judgment, contains the following: "And from all orders and rulings made by the court in reference thereto." The portion of the notice just quoted is superfluous and, whatever it means, the appeals from such "orders and rulings" are dismissed.

We concur: HOUSER, P. J.; YORK, J.



11 Cal.App.2d 409

In re MEYER'S ESTATE.

Civ. 9962.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1936.

Rehearing Denied Feb. 21, 1936.

Hearing Denied by Supreme Court March 23, 1936.

1. Executors and administrators ⇐506(3)

Evidence *held* to show that executor of estate including ranch in adjoining state did not carry on ranch business, but merely undertook to preserve and close estate and accordingly conducted litigation, paid taxes and debts, and purchased feed for cattle during drought, and hence, as against beneficiaries of testamentary trust, executor was not chargeable with shrinkage in value of estate due to drought and economic depression.

2. Executors and administrators ⇐514

Orders settling executor's preliminary accounts, from which no appeals were taken, *held* final and could not be questioned on final accounting.

3. Executors and administrators ⇐315(9)

Beneficiaries of testamentary trust, having agreed to decree of partial distribution under which certain oil and mineral rights were unconditionally distributed to executor, who was also residuary legatee and trustee, and having signed subsequent oil lease giving rents to executor personally, *held* barred from requiring executor to account therefor.

4. Appeal and error ⇐169

Question first raised on appeal would not be considered.

Appeal from Superior Court, San Francisco County; Frank H. Dunne, Judge.

In the matter of the estate of Jennie C. D. Meyer, deceased. Third and final accounting of X. Rodwell Meyer, executor of the will of the deceased. From a decree settling the account and distributing the estate, Viola Carrie Carmen Piercy Burnett, and others, beneficiaries of a testamentary trust, appeal.

Affirmed.

Thomas, Beedy & Paramore, of San Francisco, for appellants.

Tobin & Tobin and George A. Clough, all of San Francisco, for respondent.

TYLER, Presiding Justice.

Appeal from a decree settling a third and final account and of final distribution. The controversy arises over the shrinkage in the value of an estate due to the depression, and drought in the state of Nevada, where the greater part of the estate was situated. No fraud is charged in the administration.

The facts show that decedent Jennie C. D. Meyer was the daughter of one William Dunphy, deceased. By the terms of the last will of the father, a part of his estate was left in trust during the lifetime of the daughter. She was given a power of appointment over one-eighth of his estate; that is to say, upon the death of Jennie C. D. Meyer the trust created by her father's will terminated, and by the terms thereof the trust property was to pass to such person or persons as were appointed under the last will of Jennie C. D. Meyer to receive it. The daughter exercised the power of appointment. She made a will giving all of her estate, and also the interest in her father's estate over which she had a power of appointment, to her surviving husband, respondent herein, as residuary legatee, subject to a trust to convert it into money when and as he deemed it advisable, and he was then given a direction as such trustee to pay appellants, and a sister, Mary D. Flood, and a brother, James C. Dunphy, the

sum of $10,000 each when the money was available. The sister and brother are not parties to this appeal. Jennie C. D. Meyer died in the city and county of San Francisco on January 25, 1926, being at the time of her death a resident of said city and county. On March 1, 1926, X. Rodwell Meyer, her surviving husband, respondent herein, qualified as executor under her will; letters testamentary were issued to him, and he has ever since been acting as such executor. The decedent left estate consisting of real and personal property in this state, and also in the state of Nevada. The real property in Nevada consisted of some 20,000 acres of land of the value of about $80,000, and some 1,000 head of cattle of the approximate value of $60,000. At the time of her death the total value of decedent's estate was estimated to be worth about $200,000. The estate has been in probate for some nine years and two accounts have been rendered and approved. For reasons hereinabove stated, the estate has shrunken in value and little remains with which the pay the claims of the beneficiaries, and respondent has lost practically all of the large estate of which he was the residuary legatee. His third and final account was settled and approved and the estate ordered distributed. This is an appeal from the orders.

[1, 2] Appellants' main objection to the account is that it shows respondent received bonds of the value of $21,000 from the California estate, which as ancillary executor in Nevada he used in carrying on the hazardous Nevada ranch business. It is claimed that he had no power as executor to conduct a business, and having done so, and suffered a loss, the loss is his and not that of the estate. While an executor may have no such power, the principle has no application to the facts of this case. The evidence shows that the money received from the proceeds of the sale of the bonds was used to carry on litigation of the estate and to preserve the same after payment of taxes and other expenses, and the record also shows that at the time respondent took possession of the estate it was indebted, and costly litigation ensued. The taxes and claims had to be paid. Then came the depression, followed by a drought in the state of Nevada which lasted several seasons. The cattle required feed to preserve them, which feed had to be purchased at a large expense. The record shows that respondent was anxious at all times to preserve and close the estate, but was prevented from doing so by reason of the extensive litigation with which the estate was confronted. When finally respondent was in a position to sell, the cattle and lands brought little more than sufficient to pay the debts of the estate in Nevada. The evidence does not sustain appellants' contention that respondent carried on the business in which the decedent was engaged at the time of her death. All that respondent did was to preserve the estate. Moreover, counsel for appellants fail to point out any objectionable item of expenditure in the account. All of the disbursements in connection with the Nevada ranch were set out in the first and second accounts, which accounts were settled and approved several years ago. No objection was then made to them and no appeals were taken from the orders settling the accounts. The orders settling them have therefore become final and cannot now be questioned.

[3] Appellants further object to the decree on the ground that it does not include certain oil and mineral rights situated in the county of Monterey and the profits or rents arising therefrom. These rights had, under a stipulation, been distributed to respondent unconditionally in the year 1929 under a decree of partial distribution. At the time they were so distributed, it was the opinion of all parties that the assets of the estate were more than sufficient to pay the claims of appellants. The oil rights were considered of little value and counsel for appellants had purchased the one-quarter interest of James C. Dunphy in the same for the sum of $500. The purpose of the stipulation permitting distribution of the rights was to enable respondent to lease the same for the exploration of gas and mineral deposits, as the contemplated lessee was unwilling to accept a lease from the estate. The decree of partial distribution distributed to respondent all the right, title, and interest which the deceased may have had in her lifetime or which her estate may have acquired since her death in and to any of the oil, oil rights, gas, and mineral rights lying under said lands. The recitals in the decree of partial distribution show that appellants were represented in court by the same attorneys who now appear for them, and it further appears from the evidence that they agreed to the decree. The oil lease subsequently entered into by respondent with the oil company provided that the rent of the property which was set apart

to respondent, and which it is now claimed should be turned over to the trust, should be paid to respondent personally. This lease was signed by appellants. Whatever sums, therefore, respondent may have received from those rights were his personally, and he cannot be compelled to account for them in the estate. The decree of partial distribution was made by the consent of all parties over six years ago, was never appealed from, and it has become final.

Appellants further object to the decree settling the final account and distributing the estate on the ground that the executor has violated an agreement on his part to maintain sufficient funds to pay the amounts due appellants as beneficiaries of the trust. While the stipulation upon which partial distribution was had did contain such agreement, it also provided: "* * * Acts of God and matters beyond the control of said X. Rodwell Meyer, of course, are excepted." Respondent has preserved all the assets possible, and the shrinkage of the estate was due to no fault of his, but rather to causes for which under his agreement he was not to be responsible.

Appellants further claim that respondent collected from the executor of the estate of James C. Dunphy, deceased, the sum of approximately $17,000, for which no accounting was ever made. There is no evidence in the record to sustain this contention. On the contrary, it shows that he never received such amount or any other sum from this source.

[4] And finally, respondent claims that, by their action in contesting the accounts of the executor, appellants have violated the condition specified in the will authorizing them to receive any of the moneys which the testator directed the trustee to pay to them. The testatrix provided in her will that the executor's accounts should not be questioned, but that the same should be accepted and received as absolutely true and correct. She further provided for a forfeiture of benefits to any one refusing to confirm the provisions of the will. It is respondent's contention that appellants, by contesting the accounts, have brought themselves clearly within the inhibition contained in the will. The question is raised for the first time on appeal, for which reason it will not be considered.

In conclusion it may be said that whatever loss may be suffered by appellants as beneficiaries is due solely to the shrinking of the value of the estate and not to any acts or omissions on the part of respondent.

From what has been said, it follows that the decree appealed from should be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.



11 Cal.App.2d 186

NOACK v. ZELLERBACH et al. (two cases).

Civ. 9718.

District Court of Appeal, First District, Division 1, California.

Jan. 10, 1936.

Rehearing Denied Feb. 8, 1936.

Hearing Denied by Supreme Court March 9, 1936.

1. Fish ⇐11

Deputy fish and game commissioners who confiscated salmon caught on the high seas during the closed season and threatened to arrest fisherman *held* liable in tort for damages, where statute under which deputies acted was subsequently given construction that possession of fish so caught within a game district was not unlawful (Pen.Code, § 634).

2. Fish ⇐11

Fish and game commissioner *held* not liable for damages sustained when deputy commissioners wrongfully confiscated salmon and threatened to arrest fisherman, where commissioner did not know of, instruct, or ratify deputies' actions (Pol.Code, § 642; § 904 et seq.; Pen.Code, § 634).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit by Charles Noack against I. Zellerbach and others, as members of the Fish and Game Commission, etc. From the judgment, plaintiff and I. Zellerbach appeal.

Reversed, with directions.

Marshall B. Woodworth, of San Francisco, for Noack.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen., and Eugene D.

Bennett, of San Francisco, for Zellerbach and others.

GRAY, Justice pro tem.

Plaintiff sued the three members of the fish and game commission and three deputy fish and game commissioners to recover the value of salmon illegally confiscated and earnings lost because threats of arrest and further confiscations prevented him from following his occupation of deep-sea fishing. I. Zellerbach, one of the commissioners, and the three deputies answered. Plaintiff recovered judgment against I. Zellerbach for the value of the salmon, but was denied anything for loss of earnings. I. Zellerbach appeals from the first part of the judgment, and plaintiff appeals from its second part.

The primary question to be decided is whether or not the fish and game commissioner was liable for the acts of the deputy fish and game commissioners. Since a determination that he was not so liable will be decisive of both appeals, only those facts which bear upon this question need be stated. Neither appellant disputes that those facts, as found by the court, are supported by the unconflicting evidence. Hence the question resolves itself into a determination of the sufficiency of the findings to support the judgment.

The following facts appear from the findings: Plaintiff caught a cargo of salmon in the Pacific Ocean more than three miles from the California coast and delivered it at Point Reyes, within state territorial waters, to a captain of a boat for transportation to San Francisco. On its arrival at San Francisco, two deputy fish and game commissioners, not named as defendants, seized the cargo of salmon, sold it, and paid the proceeds into the fish and game preservation fund of the state. At the time of its seizure, the cargo of salmon aggregated 2,091 pounds and had a market value of 23 cents a pound, or a total value of $480.70. Subsequently the three deputies named as defendants notified plaintiff that they would arrest him if he transported or possessed within any fish and game district during the closed season any fresh salmon, *whereso-ever* caught. Plaintiff was intimidated by such threats and, induced solely thereby, refrained from deep-sea fishing for salmon during the four winter months. The value of the salmon that he would have caught, based upon his previous experience, priced at the then market value, amounted to $5,520.

[1] In confiscating the salmon and in notifying plaintiff as to his liability to future confiscations, the deputies acted under a mistaken belief that possession in San Francisco of salmon caught on the high seas was prohibited by section 634 of the Penal Code during the closed season. A year later the Supreme Court in Svenson v. Engelke, 211 Cal. 500, 296 P. 281, construed this section as not prohibiting the possession within any fish and game district during the closed season of fresh salmon caught on the high seas. Since the confiscation and threats were not justified by said section, the deputies were liable in tort for damages caused plaintiff thereby. Silva v. MacAuley, 135 Cal.App. 249, 26 P.(2d) 887, 27 P.(2d) 791. In holding that a chief of police was not liable for the acts of policemen, the Supreme Court in Michel v. Smith, 188 Cal. 199, 201, 205 P. 113, 114, said: "A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein." This statement is in accord with the rule uniformly followed in other jurisdictions. 1 A.L.R. 222; 3 A.L.R. 149; 12 A.L.R. 980. In Hilton v. Oliver, 204 Cal. 535, page 539, 269 P. 425, 426, 61 A.L.R. 297, trustees of a reclamation district were held not liable for the negligence of subordinates, the court saying: "The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of respondeat superior. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein." See annotation in 61 A.L.R. 300.

The above rule was applied in Booth v. Lloyd (C.C.) 33 F. 593, and in Mister v. Brown (D.C.) 59 F. 909, to situations arising out of facts very similar to those of the instant case. In the first case, plaintiffs sued the board of public works of the state of Maryland and the captain of a vessel in its employ for the latter's trespass in seizing and detaining plaintiffs' oyster boat for violation of a state li-

cense law. The captain was held liable because the law which was the supposed justification of his act was unconstitutional. The board was freed from responsibility for the captain's trespass in the following pertinent language, which is a complete answer to plaintiff's argument (33 F. 593, page 598): "The first difficulty that arises in the way of the plaintiffs recovering against the members of the board of public works is that they have offered no proof that they ever ordered the arrest and seizure of the plaintiffs' captains and vessels. While it may be admitted that an unconstitutional statute will offer no protection to the officer who acts under it, it is nevertheless necessary to show that he advised, directed, aided, and abetted the conduct which constitutes the cause of action. So far as this case is concerned, there is no such proof. It is left to inference, merely, that because the officer who made the seizure was an officer of the state under the control of the board of public works that therefore they directed him to make the seizure. It is not shown that the board of public works ever considered the matter, or how many of them united in a resolution to direct the captain, Smoot, to make the seizure. Surely the members of the board who voted against it are not liable, and without proof we cannot infer that all or any one consented."

The case of Mister v. Brown, supra, was a libel in admiralty against the Maryland board of public works and a deputy commander of a state fishing sloop for the death of the master of an oyster dredging schooner, who, when fleeing to escape arrest for illegal dredging, was killed by a shot fired by such deputy. The court thus described the law involved (59 F. 909, page 910): "The law of Maryland (Code, art. 72) prescribes regulations for taking oysters in the waters of the state, and directs the deputy commanders in charge of the vessels of the state fishery force to constantly guard the waters of their respective districts, and to arrest and bring to justice all violators of the law, and to seize offending vessels. By section 25 the board of public works are empowered and directed to purchase for each guard boat such arms and ammunition as may be necessary to make them efficient, and the same section directs that the officers of such boats shall be authorized to use such arms, in their discretion, for the enforcement of the provisions of the oyster laws of the state. * * * By the act of 1886, c. 296, the additional duty was imposed upon the board to supervise the commander in chief of the state fishery force in his control and direction of the force, and to appoint the commander in chief for the whole force and a deputy commander for each vessel." For the purpose of comparison, it is well to set forth the applicable part of section 642 of the Political Code: "It is the duty of the fish and game commissioners: 1. To see that the laws for the protection and preservation of * * * fishes * * * are strictly enforced, and for that purpose * * * to employ such deputies * * * as they may need; * * * all deputies appointed * * * shall be public officers and shall have all the powers and authority of sheriffs and other peace officers to make arrests for violations of such laws * * * and every deputy * * * shall furnish to the state of California a surety bond * * * for the faithful performance of his duties. * * * 2. The fish and game commissioners, or their deputies, shall seize and take possession of all * * * fish * * * which has been caught * * * contrary to any of the laws of this state." Section 904 et seq. of the same Code requires a deputy fish and game commissioner to take an oath of office.

In the cited case the fault charged against the board of public works was that they had not instructed the deputy commander to refrain from shooting when the circumstances were such as existed when decedent was shot. The reasons stated by the court in freeing the board from responsibility for the deputy commander's tort can be equally well applied to the instant case. The deputy commander was required to take an oath of office and give a bond. His duties were prescribed by law and not by the board. While the board was directed to purchase arms, the law authorized the deputy to use them. The board was not required to instruct as to the use of arms, since that was already covered by the law. The board was not present at the shooting nor had it ordered such shooting. For its purely official and ministerial action in appointing the deputy and providing him with arms, the board cannot be held personally liable for the deputy's wrongful use of the firearms. The section of the Political Code provides that a deputy fish and game commissioner is a public officer

with the powers of a sheriff and defines his duties. He acts under power originally granted to him by law and not under power derived from the commissioner, as his representative. The only allegation of the complaint which attempts to connect I. Zellerbach with the deputies' wrong was that he was then fish and game commissioner. His answer admits this and the findings follow the admission. There is neither allegation nor proof that he knew of, instructed, or ratified their actions.

[2] The findings warrant the conclusion of law that I. Zellerbach was not liable for lost earnings, but do not warrant the conclusion that he was liable for the value of the salmon. The judgment is reversed, and the trial court is ordered to correct its conclusion of law as to his liability for the value of the salmon so that it will conclude that he is not so liable and thereupon enter judgment in his favor on both counts of the complaint. In re Estate of Lee, 200 Cal. 310, 253 P. 145; Quigley v. Nash, 1 Cal. (2d) 502, 36 P.(2d) 112; Bayside Land Co. v. Dabney, 90 Cal.App. 122, 265 P. 564.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

11 Cal.App.2d 315

SOREY v. BOARD OF SUP'RS OF LOS ANGELES COUNTY.

Civ. 10329.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Rehearing Denied Feb. 17, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Justices of the peace ⇐15

Where Constitution provided that county charters should supersede all laws inconsistent therewith and supervisors acting under charter had fixed compensation of justice of peace based on population of township, statute providing for computation of population *held* inapplicable to proceedings by justice of peace to secure higher salary on ground of increase in population of his township (Code Civ.Proc. § 110a, as amended by St.1933, p. 1174; St.1913, p. 1490, § 19; Const. art. 11, § 7½).

2. Mandamus ⇐14(3)

Justice of peace whose salary had been fixed by ordinance of supervisors providing for larger salary in case population of township exceeded 30,000 could not compel supervisors to determine population of his township which had been less than 30,000 at previous census where it was not alleged that supervisors refused to take census from improper motives (St.1913, p. 1490, § 19; Pol. Code, § 4055; Const. art. 11, § 7½).

3. Appeal and error ⇐499(2)

Judgment sustaining demurrer without leave to amend, where leave to amend should have been granted, was affirmed where record showed no further application for leave to amend after order sustaining demurrer.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for a writ of mandate by Daniel S. Sorey against the Board of Supervisors of the County of Los Angeles, state of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. W. Falkner, of El Monte, and J. Vincent Hannon, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

By this proceeding petitioner seeks judicial determination that his salary as justice of the peace of El Monte township should be at the rate fixed by an ordinance of the board of supervisors of Los Angeles county for townships having over 30,000 population. The trial court sustained, without leave to amend, a demurrer of the board of supervisors to his petition for a writ of mandate, and this appeal is prosecuted from the judgment subsequently entered.

Appellant was elected at the general election in 1934 for the term commencing January 7, 1935. The salary of the office as fixed by an ordinance of the board of supervisors effective January 1, 1935, is $175 per month. The ordinance, however, provides that in the event it shall be determined that any of certain townships, including El Monte, "shall have a population of 30,000 or more, either by the United

States Census of 1930 or by judicial determination, other than by a justice court, or by the application of any method which may now or hereafter be provided by law for the determination of the population of said townships, then and in that event and commencing with the final and official proclamation or determination of the fact of the population of said townships under either or any of said methods for the determination thereof, the salary of the justice of the peace of any such township shall be $350 per month instead of the salary above specified." Appellant does not claim that the township had the required population of 30,000 by the census of 1930, or that there has been any other determination of its population. However, he alleges that on January 10, 1935, the township had a population in excess of 30,000. Upon such allegation he contends that the board of supervisors may be required by writ of mandate to determine the population. This determination must be made, according to appellant, either by computation as provided by section 110a, Code of Civil Procedure, as amended by St. 1933, p. 1174, or by a census to be taken under the provisions of section 4055, Political Code.

The question of the jurisdiction of the justice's court of El Monte township was before the Supreme Court in the case of Shea v. Kerr, 1 Cal.(2d) 604, 36 P.(2d) 189, 190. That case was a proceeding in mandamus to compel the registrar of voters of Los Angeles county to omit from the ballot to be used at the ensuing general election the name of the appellant here as a candidate for justice of the peace of El Monte township. It was claimed in that proceeding that El Monte township had a population exceeding 30,000, and that appellant here, not being admitted to the practice of law, was ineligible for election to that office under the provisions of section 4185a of the Political Code and section 159a of the Code of Civil Procedure. The court said: "No determination of the population of El Monte township as heretofore or as now constituted was made by this court prior to January 1, 1931, or at all. As stated, the 1930 federal census shows the population of the three townships now comprising El Monte township to be 26,334. This is the only authoritative determination of the population of said township and under it the justices' court therein is of class B. Any concession or stipulation of counsel as to actual population is of no controlling significance when, as here, jurisdiction of a court is involved and has been established in the manner provided by law."

[1] Notwithstanding this decision, which was a determination of jurisdiction, appellant contends that the board of supervisors must determine the population of the township for salary purposes. Section 110a Code of Civil Procedure, as amended, applying only to Los Angeles county, is in part as follows: "For the purposes of this section, the population of the townships in counties of this class shall be determined by multiplying the number of registered voters at the last general election by three and one-half," or by taking the population of such townships as fixed by the last United States census, and the method of determination selected must be the method which will give the larger population to a given township. However, the Constitution provides that county charters shall provide: "3. For the number of justices of the peace and constables for each township * * * and for their compensation, or for the fixing of such compensation by boards of supervisors." Article 11, § 7½. The Los Angeles county charter, pursuant to this authority, authorizes the board of supervisors to fix the compensation of justices of the peace (article 5, § 19, St. 1913, p. 1490), and this authority has been exercised by the ordinance previously mentioned.

The Constitution also provides that a county charter upon its ratification by the Legislature "shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter," and also, that "whenever any county has framed and adopted a charter, and the same shall have been approved by the legislature, as herein provided, the general laws adopted by the legislature in pursuance of sections 4 and 5 of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section, it is competent to make provision in such charter, and for which provision is made therein." Article 11, § 7½. Under these provisions section 110a, Code of Civil Procedure, as amended, has no application to Los Angeles county.

Jones v. De Shields, 187 Cal. 331, 202 P. 137.

[2, 3] This brings us to a consideration of section 4055, Political Code. That section provides: "The board of supervisors in years other than those in which a census is taken by the United States, may cause by ordinance, when necessary, a census of their respective counties, or any township or district therein to be taken." Appellant insists that having presented to the board of supervisors his verified petition alleging "that the population of the said El Monte Justice's Court Township is more than 30,000, as shown by the number of registered voters in the last General Election in November, 1934," the board may not refuse to have a census taken. The population of the township must be established as exceeding 30,000 before appellant is entitled to the salary of a justice of the peace of a class A township. He urges that the board of supervisors may not arbitrarily refuse to take such a census upon the showing made by him.

The allegation in the petition for a writ of mandate concerning the action of the board of supervisors is that it denied appellant's petition addressed to it "and refused and have ever since refused and still refuse to make an order or declaration determining the population of said El Monte Justice's Court Township as prescribed by section 3 of said ordinance No. 2547 (New Series) and in accordance with the terms of section 110a of the Code of Civil Procedure of the State of California, or otherwise." In the case of Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784, the court referred with approval to its previous decisions holding that when boards are by statute vested with discretion with respect to the exercise of their powers, courts will not interfere with that discretion "in the absence of grave reasons tending to show that fraud, corruption, improper motives, or influences, plain disregard of duty, gross abuse of power, or violation of law entered into or characterized the determination of such body." There is no allegation that the board of supervisors refused to have a census taken because of any improper motives or influences. For all that appears in appellant's petition, there may have been substantial evidence before the board of supervisors at the time of its consideration of the matter that the population of El Monte township did not exceed 30,000, and that it had abundant reason for refusing to undertake a census with considerable expense to the people of the county. By the allegations and prayer of the petition, appellant is not seeking a writ to compel the board to act on his demand. He is attempting to secure action favorable to him. The showing made is clearly insufficient and the demurrer was properly sustained, although leave should have been granted to amend. However, as the record shows no further application to the court for permission to amend after the order sustaining the demurrer (Allen v. Stellar, 106 Cal.App. 67, 288 P. 855), the judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

HENRICKS v. METROPOLITAN LIFE INS. CO.*

Civ. 10624.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1936.

Hearing Granted by Supreme Court March 9, 1936.

1. Insurance ⇨367(1)

Statutory provision for term insurance after default in premium payments must be read into life policy giving options on default in premium payments only where there is no indebtedness on policy (Civ.Code, § 450).

2. Insurance ⇨367(1)

Double indemnity clause in contract of life insurance constitutes "life insurance" and must contain automatic nonforfeiture value (Civ.Code, § 450).

[Ed. Note.—For other definitions of "Life Insurance," see Words & Phrases.]

3. Insurance ⇨367(1)

Beneficiary's election to take under one of the optional values specified in lapsed life policy *held* not to preclude her from subsequently electing to claim under statutory provision for term insurance omitted from but required to be read into policy (Civ.Code, § 450).

4. Evidence ⇨12

In determining amount necessary to purchase double indemnity insurance from time

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 61 P.2d 1162.

policy lapsed to insured's death, trial court could take judicial notice of standard digests giving cost of all types of insurance by major insurance companies doing business in United States.

5. Insurance ⇐665(5)

Evidence *held* to sustain finding relative to amount necessary to purchase double indemnity insurance from time policy lapsed to time of insured's death, since presumption existed that trial court took judicial notice of standard digests which supported finding.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Edythe H. Henricks against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Black, Hammack & McWilliams, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment entered against it in an action upon a policy of life insurance.

The stipulated facts are: On May 19, 1924, the defendant issued a policy of insurance upon the life of Noah Henricks in the sum of $2,500. The nonforfeiture provisions of this policy so far as material here are as follows:

"Options on Surrender or Lapse—Upon failure to pay any premium or any part thereof when due, this Policy, except as otherwise provided herein, shall immediately lapse. If, however, the lapse occur after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall, upon written request filed with the Company at its Home Office together with the presentation of the Policy for legal surrender or for endorsement within three months from the due date of premium in default, be entitled to one of the following options:

" 'First—A cash surrender value.

" 'The Company in its discretion may defer the payment of the cash value for a period not exceeding ninety days after the application therefor is received by the Company.

" 'Second—To have the insurance continued for a reduced amount of non-participating paid-up insurance (including any existing additions to the credit of the Policy), payable at the same time and under the same conditions as the Policy. Such paid-up insurance shall have an increasing cash surrender value equal to the full reserve at the date of surrender, or a loan value up to the limit of the cash surrender value. Interest on loan under such paid-up insurance shall be payable annually in advance to the end of the policy year at the rate of six per centum per annum.

" 'Third—To have the insurance continued for its original amount as term insurance in whole number of months from due date of premium in default, without participation and without the right to loan, but with a cash surrender value decreasing each year and ceasing entirely upon the expiry of the extension term, which value shall be the full reserve in even dollars for each one thousand dollars of insurance at the date of surrender.

" 'If the owner shall not, within three months from the date of premium default, surrender this Policy to the Company at its Home Office for a cash surrender value or for endorsement for paid-up insurance or term insurance as provided in the above options, the policy shall be continued for a reduced amount of paid-up insurance as provided in the second option.

" 'The values of these options are mathematical equivalents, and have been calculated on the basis of the Metropolitan Intermediate Table of Mortality, as adopted by the Insurance Department of the State of New York for computing reserves hereunder, with interest at three and one-half per centum per annum (omitting fractions of a dollar per thousand of insurance) less a surrender charge not exceeding in any case two and one-half per centum of the face of the Policy; except that after the time for which premiums are payable as stated on the first page hereof, no surrender charge has been made. These values as computed produce the results set forth in the table herein at the end of the respective years. Values for other years (after the twentieth) will be computed upon the same basis for the entire reserve in even dollars for each one thousand dollars of insurance, and for even months in the event of election of term insurance, and will be furnished upon request of the Insured.

" 'Any indebtedness to the Company under this policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance in such proportion as the indebtedness bears to the cash value at due date of premium in default.

" 'The reserve for which funds are to be held upon this Policy shall be computed upon the Metropolitan Intermediate Mortality Table (as adopted by the Insurance Department of the State of New York), with interest at three and one-half per centum per annum.' "

This policy had attached to it as of the same date a supplementary contract executed by the defendant, which by its terms was made a part of the life insurance policy, providing for double indemnity, in event the insured died as a result directly, or independently of all other causes, of bodily injuries sustained through external, violent, and accidental means.

It also contained this provision:

"This supplementary contract shall automatically terminate and be of no further force or effect if any premium on said policy, or on this supplementary contract, shall remain unpaid at the end of the period of grace allowed under said policy for payment of premium thereunder or if said policy be surrendered or converted under one of its nonforfeiture provisions or otherwise terminated."

All premiums on the policy and supplementary contract were paid to February 19, 1932, but the premium due on that date was never paid. May 8, 1932, insured was drowned.

The insured had borrowed $260.80 against the policy, which sum together with interest left a total indebtedness at the date of death of $270.15.

Three months after the policy had lapsed, plaintiff, the beneficiary named in the policy, demanded that the third nonforfeiture option specified in the policy be allowed her.

In addition to the stipulated facts, the trial court found:

"That the sum of $33.60 applied as a net single premium to purchase Paid-Up Non-Participating Term Insurance in the sum of $2,500.00 at the age of twenty-nine and three-fourths years, and to purchase insurance in the amount of $2,500.00 insuring against loss of life as a result, directly and independently of all other causes, of bodily injury sustained through external, violent and accidental means, would purchase said insurance in the total amount of $5,000.00 for a period in excess of two months (2) and nineteen (19) days."

The lower court gave judgment for the plaintiff in the sum of $5,000.

Defendant relies for reversal of the judgment on four propositions:

First. Section 450 of the Civil Code (now section 10151 of the Insurance Code [St. 1935, p. 496]) requires only one of the three forms of automatic nonforfeiture value to be contained in a life insurance policy.

Second. A supplementary contract of double indemnity insurance in the event of death by accidental means need not contain an automatic nonforfeiture value.

Third. If, in lieu of the automatic nonforfeiture value provided in a life insurance policy, the beneficiary voluntarily and expressly elects to have one of certain other optional values specified in the policy, she is bound by such election and by the terms of the option so exercised.

Fourth. There was not any evidence to sustain the trial court's finding relative to the amount necessary to purchase double indemnity insurance for a period in excess of two months and nineteen days.

[1] Defendant's first proposition is answered adversely to its contention by Metcalf v. Metropolitan Life Ins. Co., 1 Cal. App.(2d) 481, 489, 37 P.(2d) 115, 38 P. (2d) 401, in which case the District Court of Appeal of this state for the Third Appellate District held, in construing the nonforfeiture provisions of a life insurance policy identical with those in the instant case, that such provisions did not comply with the requirements of section 450 of the Civil Code (now section 10151 of the Insurance Code), and that the first provision of said section, granting nonparticipating term insurance, where the policy failed to comply with the requirements of the section, should be read into the policy. The Supreme Court in denying a hearing in Metcalf v. Metropolitan Life Ins. Co., supra, withheld its approval from that portion of the opinion relating to section 450 of the Civil Code, presumably for the reason that it was dictum in the case. We are, however, of the opinion that this dictum states the correct rule of law.

[2] The second proposition must be answered adversely to defendant's contention, as the correct rule is stated in New York

Life Ins. Co. v. Rositzky (C.C.A.) 45 F. (2d) 758, writ of review denied by the United States Supreme Court, 283 U.S. 829, 51 S.Ct. 353, 75 L.Ed. 1442. In this case the United States Circuit Court of Appeals, Eighth Circuit, held that a double indemnity clause in a contract of insurance was life insurance and therefore that the Missouri nonforfeiture value statutes were applicable. Judge Kenyon, quoting with approval from Logan v. Fidelity & Casualty Co., 146 Mo. 114, 47 S.W. 948, 950, at page 763 of 45 F.(2d), says:

"When a policy covers loss of life from external, violent, and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance policy admittedly would be insurance on life. Then, why less insurance on life because not coupled with provisions covering loss of life from usual or natural causes as well? * * *

"The mere addition of one or more features or elements in a contract of insurance on life, that may serve to give the contract or policy a particular designation in the business or insurance world, will not in the least devest the contract or policy of its chief character of insurance on life, or make the contract other than life insurance. The promise to pay a weekly indemnity by an insurance company in the event the insured receives an injury from an accident not resulting in death, does not change the character of the agreement of the policy to pay a certain other sum when the accident results fatally, which is life insurance from accidental causes, as the promise to pay a certain stipulated sum to the insured (now contained in many of the policies issued by what is known as 'old-line' life insurance companies), when the insured attains a given age, or in a definite specified time, and if before the insured arrives at the age designated, or before the time fixed for its certain payment, he shall die from any cause, accidental or otherwise, to pay his legal representatives or some one named in the policy as beneficiary the amount stipulated, is none the less life insurance because coupled with an investment or bond feature, not found in what is commonly known as a 'straight' life insurance policy. The calling of a contract of insurance an 'accident,' 'tontine,' or 'regular' life policy, or, for that matter, by any other appellation that may be adopted for business or conventional uses or classification, cannot make a policy containing an agreement to pay to another a sum of money designated upon the happening of an unknown or contingent event, depending upon the existence of life, less a policy of insurance on life.

"Insurance on life includes all policies of insurance in which the payment of the insurance money is contingent upon the loss of life."

[3] Defendant's third proposition is answered contrary to its claim by the provision of section 450 of the Civil Code (now section 10153 of the Insurance Code) providing that, "No agreement between the company and the policy-holder or applicant for insurance contrary to the foregoing (referring to the nonforfeiture values) shall be held to waive any of the provisions provided above."

Clearly, in view of this unequivocal pronouncement of the Legislature, neither the insured nor beneficiary in the policy could by election or any other purported agreement or act waive the benefits conferred by section 450 of the Civil Code.

[4, 5] The final proposition presented by defendant is untenable, since, in the absence of a showing to the contrary in the record, it will be presumed that the trial court took judicial notice, as it might properly have done, of such standard digests as the "Unique Manual," which is issued annually by the National Underwriters and gives the cost of all types of insurance written by the major insurance companies doing business in the United States. At page 26 of this digest for the year 1932 it will be observed that there was substantial evidence to support the finding under scrutiny here. Dickinson v. Southern Pacific Co., 172 Cal. 727, 730, 158 P. 183; 23 Cor.Jur. 163, § 1989.

The judgment is affirmed.

I concur: CRAIL, P. J.

I concur in the judgment: WOOD, J.

HOME v. KRAMER et al.*

Civ. 10661.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1936.

Hearing Granted by Supreme Court March 19, 1936.

1. Bankruptcy ⊂⊃189

Lessor who leased building subject to lien upon fixtures to secure rental; which lien was void as to creditors of lessee, *held* guilty of conversion as to trustee in bankruptcy of lessee in executing to purchaser of building a bill of sale to fixtures, notwithstanding he acted under honest belief of ownership and advised purchaser of trustee's claim.

2. Appeal and error ⊂⊃237(2)

Where question to which objection was sustained was answered by witness and no motion was made to strike answer, exclusion of evidence *held* not reviewable.

3. Appeal and error ⊂⊃205

Where question to which objection was sustained did not indicate that answer would be favorable to party proffering testimony, and such party did not make offer to trial court of what was proposed to be proven, exclusion of evidence *held* not reviewable.

4. Appeal and error ⊂⊃757(4)

Failure of appellant to print in brief instructions requested by him and which he claimed were erroneously refused, *held* to preclude consideration thereof (Rules of Supreme Court and District Courts of Appeal, rule 8, § 3, p. 10).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Paul K. Home, as trustee in bankruptcy for the estate of K. & G. Markets, Inc., bankrupt, against Nathan Kramer, Frank Gorbach, sometimes known as Frank Garbach, and another. Judgment for plaintiff, and the second named defendant appeals.

Affirmed.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for appellant.

Craig & Weller, Thomas S. Tobin, and Charles A. Deffebach, all of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff entered after the trial judge directed the jury to return a verdict against the defendant, submitting to the jury solely the amount of damage to be assessed.

The conceded facts are:

On March 1, 1933, defendant leased to Nathan Kramer a market building. Among other requirements the lease provided that any fixtures or equity therein placed on the premises by the lessee or subtenant or any fixtures on the premises at the date of execution of the lease should constitute additional security for the faithful performance of the terms of the lease. Concurrently with the execution of this lease the K. & G. Markets, Inc., guaranteed performance by the lessee of all of its terms and conditions. On the same date the lessee subleased a portion of the premises to Jacob Z. Krantman, who in turn permitted K. & G. Markets, Inc., to occupy the property and take possession of the fixtures thereon.

It is agreed that defendant's lien was void as to creditors of the lessee and sublessee.

August 6, 1934, plaintiff was duly appointed trustee in bankruptcy of the K. & G. Markets, Inc., a bankrupt. Claims of creditors of this subtenant were duly filed and allowed by the referee in bankruptcy.

Thereafter defendant, knowing of the appointment of plaintiff as trustee in bankruptcy for the K. & G. Markets, Inc., executed a bill of sale covering the fixtures located on the leased premises to Walter H. Sage, who shortly prior thereto had purchased the real property described in the above-mentioned lease from the defendant. The vendee was fully advised by defendant that plaintiff claimed to be the owner of the fixtures described in the bill of sale.

Defendant relies for reversal of the judgment on three propositions:

First. When the owner of a building leases it, subject to a provision giving him a lien upon the fixtures in the demised premises to secure the rental, which lien is void as to creditors of the tenant, and the lessor thereafter sells the building and transfers to his vendee such title as he has in the fixtures, this act does not constitute a conversion as to the trustee in bankruptcy of the tenant.

⊂⊃For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 854.

Second. The trial court erred in excluding evidence as to the consideration for the bill of sale executed by defendant to his vendee.

Third. The trial court erred in refusing certain instructions requested by defendant on the measure of damage.

[1] The first proposition presented by defendant must be answered adversely to his contention. The law is settled in this state that one who disposes of property belonging to another is guilty of conversion, even though he acts under an honest but mistaken belief that he is the owner of the property. Dodge v. Meyer, 61 Cal. 405, 420 Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 51 L. R.A.(N.S.) 925; Horton v. Jack, 126 Cal. 521, 526, 58 P. 1051. In the instant case the defendant evinced his claim to the fixtures adversely to plaintiff, when he executed and delivered to Sage a bill of sale disposing of the property which belonged to plaintiff. The fact that defendant fully advised his vendee of plaintiff's claim is immaterial, in view of the authorities cited, supra.

[2, 3] The second proposition presented by defendant may not be urged in this court, for the reason that either (a) the question to which an objection was sustained was answered by the witness and a motion was not made to strike the answer from the record, thus leaving the testimony before the jury for its consideration, or (b) defendant did not lay the proper foundation in the trial court for review here. Where a question, to which an objection is sustained, does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal by this court, an offer of what is proposed to be proven must first be made to the trial court, so that this court can determine whether the proposed evidence would have been material and beneficial to the party offering it. County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 84, 22 P. 61; Grandy v. Southern Pacific Co. (Cal.App.) 49 P.(2d) 1127; Whitelaw v. Whitelaw, 122 Cal.App. 260, 263, 9 P.(2d) 874. In the instant case the questions asked did not indicate the answer anticipated nor was any offer of proof made. Snowball v. Snowball, 164 Cal. 476, 480, 129 P. 784. Therefore the record fails to show error on the part of the trial court in its rulings on the admission of evidence.

[4] The final proposition urged by defendant will not be considered by us because he has failed to observe the provision of rule VIII, section 3, of this court requiring the party alleging error to print in his brief the instructions requested by him and which he claims were erroneously refused by the trial court. Rule VIII, § 3, p. 10, Rules of the Supreme Court and District Courts of Appeal of the State of California.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

11 Cal.App.2d 268

GROTHEER et al. v. MEYER ROSENBERG, Inc., et al.

Civ. 9705.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1936.

1. Corporations ⇐1

Where corporate cloak is being used merely as instrumentality through which individual who is owner of its capital stock transacts his business, corporation will be held liable for obligations of its owner.

2. Corporations ⇐1

In judgment creditors' action to hold corporation liable on judgment against individual, allegations that corporation was organized as shield for individual and was continuation of individual's business under same control *held* to establish corporation the alter ego of individual, rendering corporation liable for individual's debts (Code Civ.Proc. § 537, subd. 1).

3. Attachment ⇐4

To uphold writ of attachment, it is not necessary that action in which attachment was granted be either legal or equitable (Code Civ. Proc. § 537, subd. 1).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Attachment ⇨6

Action to hold corporation liable as alter ego of individual on judgment obtained against individual *held*, irrespective of nature of transaction on which judgment was founded, an action based on a contract for payment of money, and hence plaintiff was entitled to attachment at commencement of action (Code Civ.Proc. § 537, subd. 1).

5. Attachment ⇨4

That corporation sought to be held liable as an alter ego on judgment against individual was not a party to judgment *held* not to preclude granting plaintiff, at commencement of action, an attachment against property of corporation (Code Civ.Proc. § 537, subd. 1).

6. Appeal and error ⇨843(2)

Determinative question presented by plaintiffs' appeal from order dissolving attachment granted plaintiffs at commencement of action was whether plaintiffs were entitled to attachment under allegations of complaint, and reviewing court in answering question in affirmative was not required to determine effect of its judgment upon lien created by attachment (Code Civ.Proc. § 537, subd. 1; § 946).

7. Courts ⇨120

Superior court possessed jurisdiction to entertain judgment creditors' action to hold corporation liable, as alter ego of individual, on judgment against individual, since allegations were equitable in nature.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Harry W. Grotheer and another against Meyer Rosenberg, Incorporated, and others. From an order dissolving an attachment obtained by plaintiffs and levied on property of the named defendant, plaintiffs appeal.

Order reversed, with directions.

Albert J. McGuire and Jerome L. Schiller, both of San Francisco, for appellants.

Samuel D. Hamburg, of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiffs seek by this action to hold the defendant Meyer Rosenberg, Inc., liable for the payment of a money judgment previously obtained by plaintiffs against the defendant Meyer Rosenberg, individually, upon the ground that said corporation is the alter ego of Meyer Rosenberg, individually. At the time of the commencement of the action they secured a writ of attachment which they caused to be levied on a bank account of $624.33 standing in the name of said corporation. Thereafter the corporation moved to dissolve the attachment, and pursuant to said motion an order was entered vacating, setting aside, and recalling the writ of attachment and directing the sheriff to release all property levied upon. From such order plaintiffs have taken this appeal.

It was contended by the respondent in the trial court, and is now urged on appeal in support of said motion, that neither of the two causes of action set forth in the complaint are founded on contract, express or implied, for the direct payment of money (subdivision 1, § 537, Code Civ.Proc.), and that therefore the ancillary remedy of attachment is not available to plaintiffs. We find no merit in this contention.

The following are the facts as they appear from the allegations of the complaint, which at the time the motion was heard and determined were not denied by answer, affidavit, or otherwise: During the month of November, 1931, Meyer Rosenberg, a contractor engaged in the business of grading and excavating, while grading property adjacent to plaintiffs', negligently damaged plaintiffs' property. On September 25, 1933, they brought an action against him in the municipal court for the damages thus sustained; and on March 20, 1934, judgment was entered in their favor for the total sum of $2,750 and costs. However, a few days prior to the commencement of the action and on September 12, 1933, Rosenberg organized a corporation under the name of Meyer Rosenberg, Inc., and on November 15, 1933, transferred to the corporation all of his property and assets consisting of his contracting machinery and implements, contracting and office equipment, existing contracts, accounts and notes payable, cash on hand, and a considerable amount of oil stock, all of which he had acquired in the operation of his contracting business; and in consideration of such transfer the corporation agreed to assume all obligations and debts incurred by Rosenberg while conducting said business. In thus divesting himself of all of his property, Rosenberg, so the complaint alleges, rendered himself insolvent, and on May 22, 1934, approximately two months after plaintiffs secured the judgment for damages against him, they brought the present action to obtain a money

judgment against the corporation covering the amount called for by the judgment entered against Rosenberg individually, incidental to the commencement of which action they secured and caused to be levied said writ of attachment with the result already stated.

[1-3] In charging that Meyer Rosenberg, Inc., was the alter ego of Meyer Rosenberg individually, the complaint alleges in substance, among other things, that the corporation was merely a continuation of the business of Meyer Rosenberg individually, under the same control and management, but under a corporate name; that the total number of outstanding shares of stock issued by the corporation is 503, of which Rosenberg owns 501; and that the remaining 2 shares are held by two other persons merely for the purposes of corporate organization. It is also alleged that said corporation was not organized by Rosenberg in good faith, in furtherance of any lawful object, but solely for the purpose of providing an instrumentality behind which he might shield himself from liability for debts theretofore and thereafter incurred by him individually; and that by transferring all of his property to said corporation he attempted to place beyond the reach of plaintiffs all assets belonging to him out of which they might satisfy the judgment they had secured against him.

If the foregoing allegations are true, then Meyer Rosenberg, Inc., is doubtless liable for the debts of Meyer Rosenberg individually, for it is well settled that inasmuch as the separate personality or capacity of a corporation is but a statutory privilege, it must not be utilized for fraudulent purposes, such as a cloak or disguise for the evasion of contracts or other obligations; and that where it appears that it is being used merely as an instrumentality through which an individual who is the owner of its capital stock transacts his business, both law and equity will hold the corporation liable for the obligations of its owner. 6 Cal.Jur. 597, 598; 6A Cal.Jur. 75; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Meizlisch v. San Francisco Wool, etc., Co., 213 Cal. 668, 3 P.(2d) 310. In applying the above doctrine in the case of D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.(2d) 251, 252, 79 A.L.R. 329, the court said: "The corporation was distinctly a one-man corporation. It was Goldberg's alter ego, completely owned, dominated, and controlled by him. * * * The separateness of the person and the corporation would of course be recognized if no inequitable results would follow. But, where, as here, an inequitable result would follow, the two should be considered as one, and the doctrine of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, and Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723, would apply." Another case wherein language equally forceful was used is Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986. And it has been specifically held in the cases of Stanford Hotel Co. v. M. Schwind Co., supra, and Meizlisch v. San Francisco Wool, etc., Co., supra, that in actions of this kind, where the obligation for which the alter ego corporation is sought to be held liable is based on contract, express or implied, for the direct payment of money, process of attachment is available against the property of said corporation. In so holding the court in the Stanford Hotel Case goes on to say that in order to obtain a writ of attachment the action must be upon contract, express or implied, for the direct payment of money, and if a recovery on such contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable or partly legal or partly equitable. The Code section (subdivision 1, § 537, Code Civ.Proc.) does not in terms prescribe that the action must be in law or that it may not be in equity, or that it may not be one of either law or equity or both. Hence it is not necessary in order to uphold a writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, express or implied, for the direct payment of money, or distinguished from actions for damages for the breach of contracts other than for the direct payment of money or for fraud in entering into contracts.

[4] It is true that the present case is based on a judgment for the direct payment of money, whereas the causes of action stated in the two cases above cited were based upon original contractual obligations for the direct payment of money; but the distinction mentioned does not alter the situation, because it is well settled that an action based on a judgment is an action based on a contract [Weaver v. San Francisco, 146 Cal. 728, 81 P. 119; Jones v. Union Oil Co., 218 Cal. 775, 25 P.(2d) 5], and this is

so irrespective of the nature of the transaction on which the judgment is founded (33 Cor.Jur. 1056), and even though the judgment be rendered upon an unassignable cause of action for tort (Lawrence v. Martin, 22 Cal. 173), it being held in this regard that after the recovery of the judgment, whether it is for a tort or upon contract, the judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on his part to pay it. The previous action, whatever it was, becomes merged in the judgment. See authorities cited in Gutta-Percha, etc., Mfg. Co. v. Mayor, etc., 108 N.Y. 276, 15 N.E. 402, 2 Am.St.Rep. 412.

[5] It is true also that the alleged alter ego corporation in the present case was not a party to the judgment; but neither were the alleged alter ego corporations sued in the two cases mentioned parties to the contracts therein sued upon. It was held, nevertheless, under circumstances similar to those here alleged, that attachment proceedings would lie against the property of such corporations; that equity will strip off the mask of a separate corporate identity when it is but a mask, and regard the new corporation as a continuation of the business of the original debtor and hold it liable for the debts thereof.

For the reasons stated it is our conclusion that the form of action filed herein justified the issuance and levy of the writ of attachment against the property of Meyer Rosenberg, Inc.

[6] Respondent further contends that the question presented by the appeal has become moot for the reason that it appears from the bill of exceptions that plaintiffs failed to perfect their appeal from the order complained of within the statutory period during which the attachment was automatically continued in force after the making of such an order. Section 946, Code Civ.Proc. The determinative question presented by the appeal is, however, whether under the allegations of the complaint plaintiffs were and are entitled to a writ of attachment; and in deciding that question in the affirmative we are not called upon to go further and say what the effect of the reversal of the trial court's order may have upon the lien created by the attachment. Flagg v. Puterbaugh, 101 Cal. 583, 36 P. 95.

[7] Respondent's final contention that the superior court was without jurisdiction to entertain the action is likewise without merit for the reason that the issues presented by the allegations of the complaint are equitable in their nature and therefore triable in the superior court.

The order appealed from is reversed, with directions to the trial court to enter an order denying respondent's motion for a dissolution of the attachment.

We concur: TYLER, P. J.; CASHIN, J.

MORRIS v. CITIZENS BANK OF MONROVIA et al.*

Civ. 9521.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1936.

Hearing Granted by Supreme Court March 23, 1936.

1. Appeal and error ⇐931(1)
Reviewing court must view evidence in light most favorable to successful parties.

2. Appeal and error ⇐1010(1)
Finding supported by any substantial evidence cannot be reversed, regardless of strength of contrary evidence, although evidence of successful party upon issue consists merely of disputable presumption, as where sole evidence of consideration for note sued on is presumption arising from its execution.

3. Appeal and error ⇐989
In reviewing sufficiency of findings to support judgment, regard will be had to ultimate facts found, and not to mere probative facts not shown by findings to be the only facts proved or relied on for findings of ultimate facts.

4. New trial ⇐99
Motions for new trial for newly discovered evidence are never favored.

5. Appeal and error ⇐981
Trial court's refusal of motion for new trial for newly discovered evidence will not be reversed, in absence of strong showing of abuse of discretion.

6. New trial ⇐99
New trial for newly discovered evidence *held* properly refused, where existence, whereabouts, and testimony of alleged new-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 60 P.2d 996.

ly discovered witness were known by movant and her counsel at time of trial, no application for continuance was presented, and no showing of diligence entitling movant to continuance was made.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Grace A. Morris against the Citizens Bank of Monrovia and another. From a judgment in favor of defendants and from an order denying a motion for a new trial, plaintiff appeals.

Affirmed.

William E. Reiley, of Los Angeles, for appellant.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendants and from an order denying a motion for a new trial, in an action for the rescission of a promissory note and for injunctive relief.

Appellant's opening brief, including the appendix, contains 721 pages, and we have had to read to page 110 to find what are the points upon which appellant relies because the topical index which is intended to give us some preliminary information contains only one item on the subject as follows: "Points and Authorities 110."

Section 2 of rule VIII, Rules of the Supreme Court and District Courts of Appeal, which provides that a statement of the question involved on appeal shall be set forth on the first page of appellant's opening brief, provides further "the statement in its entirety should not exceed twenty lines, must never exceed one page." One of the penalties for a failure to observe this rule is that the court may dismiss the appeal on its own motion. The appellant has violated this rule by consuming three pages in this statement. Having convinced ourselves by reading the briefs from beginning to end as well as large portions of the record that there is no reversible error, we were first inclined to dismiss the appeal for failure to comply with the rule, and, if this case were one which came to us by direct appeal, we would do so. But the case is one in which the appeal was first taken to the Supreme Court and was thence transferred to this court because we are fully caught up with our work and are able to take additional work. Upon a petition for transfer to the Supreme Court, which may later be made, that court may wish to know what the case is all about, and for that reason we shall take the time and extra labor involved in setting forth the contentions of appellant and the grounds for our decision that there is no reversible error.

Turning now to the points upon which appellant relies, we find that the first 19 of them are contentions that there is no evidence to sustain the findings of the trial court.

There is no shorter nor more economical method of illustrating the great majority of appellant's contentions and, indeed, the nature of the case as well, than to present the first paragraph of the three pages which appellant has designated "Questions presented by the appeal." After boiling it down, it reads as follows: "Where a woman in June 1930 guarantees a note of her son for $12,750, which sum represents the accumulated indebtedness of her husband, from whom she is getting a divorce, evidenced by four notes; another note for $75, executed by one son, and another note by another son for $575. And none of these notes was surrendered, canceled, marked paid or in any way extinguished until January, 1931. Was there any consideration for the original note of $12,067.50? If there was no consideration for the first note was there any consideration for a second note which included the $12,067.50 item?" The answer to appellant's questions is that there is absolutely nothing in the hypothesis which she presents that would preclude a trial court from finding that there was a consideration for the promissory note sued upon. We give this illustration for the reason that by the appellant's own admission "this question of consideration runs throughout all the findings and is the essential basis for the conclusions of law. * * *"

[1-3] Appellant says on page 115 of her brief: "We are not unmindful of the rule that a promissory note itself carries with it a presumption, and that this presumption is evidence. And it being evidence, there is an apparent conflict in the testimony at the trial, and that this court will not weigh evidence. But * * *," etc. The brief is shot full with other acknowledgments on the part of appellant that this court will not weigh evidence and

that, where there is a substantial conflict in the testimony at the trial, this court on appeal will not interfere with the findings. Nevertheless, she does not appear to be able to make practical application of the rule, for the case is presented and argued by the appellant as though this court were a factfinder, as though we were authorized to weigh evidence and determine conflicts, as though she were entitled on appeal to a trial de novo. Appellant must keep in mind that it is our duty to view the evidence in the light most favorable to the parties who were successful in the trial court, and that, when the contention is made that there is not sufficient evidence to sustain a finding, our duty in that regard stops when we have found any substantial evidence to support the finding. And this is true, however strongly such evidence may be opposed by other evidence. This rule is applicable even where the evidence of the successful party upon the issue consists merely of a disputable presumption, as, for example, where the sole evidence of a consideration for a note sued on is the presumption arising from its execution (2 Cal.Jur. 933, and cases cited), although in the instant case there is much more and much stronger evidence of a consideration for the note. For a valuable discussion of the question of consideration for a promissory note where the same contention of lack of evidence was raised, see Herbert v. Lankershim (Cal.App.) 52 P.(2d) 1007. Appellant should also keep in mind that in reviewing the sufficiency of the findings to support a judgment regard will be had to the ultimate facts found, and not to mere probative facts which are not shown by the findings to be the only facts proved and the only facts or evidence from which the court finds the ultimate facts. 2 Cal.Jur. 872, and cases cited in Ten-Year Supplement, 1926-1936, vol. 1, p. 528.

We have read the briefs from beginning to end and parts of appellant's briefs three or four times, and we are satisfied that there is substantial evidence to sustain the ultimate findings of the trial court. It would serve no useful purpose to set out the evidence upon which we rely for this statement. Koeberle v. Hotchkiss (Cal. App.) 48 P.(2d) 104.

The next contention of the appellant is that the court erred in overruling the motion for a new trial because of the insufficiency of the evidence to sustain the findings. This contention is like unto those which have gone before and falls with them upon the same ground.

[4-6] The final contention is that the court erred in overruling the motion for a new trial upon the ground of newly discovered evidence. Motions for a new trial on this ground are never favored, and it would take a strong showing of abuse of discretion before an appellate court would reverse a judgment on this ground. In this case the evidence was not newly discovered. The existence of the witness, his whereabouts and what he would testify to, were known by the appellant and her counsel at the time of the trial. No application for a continuance was presented and no showing of diligence such as would entitle the appellant to a continuance was made. There is no merit in any of appellant's contentions.

Judgment and order appealed from affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



11 Cal.App.2d 287

SKOGLUND v. MOORE DRY-DOCK CO.

Civ. 9643.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Trial ⇐343

General verdict for plaintiff imports finding in his favor on all averments of complaint material to recovery.

2. Trial ⇐165

In determination of motion for nonsuit, court has duty to resolve in plaintiff's favor all conflicts of evidence and to give him benefit of all legitimate inferences therefrom, and nonsuit must be denied unless there is no substantial evidence to support judgment for plaintiff.

3. Wharves ⇐21

In action for injuries received by ship's fireman when he stumbled on loose board on dock after wandering in dark from direct path from entrance of shipyard to ship, evi-

dence *held* to support implied finding that shipyard owners were negligent in failing to furnish fireman with safe route from entrance of shipyard to ship.

4. Wharves ⇐21

Invitee passing through shipyard on way to ship upon which he was employed *held* not to become licensee to whom owners of shipyard would be liable only for willful injury by wandering from direct course from entrance of shipyard to ship because of owners' negligence in failing to provide adequate lights.

5. Wharves ⇐21

Where invitee in shipyard received injuries when he stumbled on loose board on dock onto which he had wandered because of negligence of shipyard owners in failing to provide adequate illumination, negligence of shipyard owners was proximate cause of injuries and stumbling by invitee was not intervening cause which would relieve shipyard owners from liability.

6. Wharves ⇐21

Invitee's action in attempting to pass through shipyard to ship upon which he was employed when route was inadequately lighted *held* not contributory negligence as matter of law when he stumbled on loose board on dock onto which he had wandered after he lost his way.

7. Wharves ⇐21

Fireman on ship docked at shipyard for repairs who was paid off on Saturday and ordered to report on following Tuesday *held* in employment of ship while returning thereto through shipyard on evening before day upon which he had been ordered to report so as to be invitee to whom shipyard owners owed duty of due care.

8. Stipulations ⇐9

Stipulation between representative of plaintiff's attorney of record and defendant's attorney at taking of deposition *held* not binding on plaintiff so as to prevent introduction of evidence in conflict therewith where stipulation was not filed in writing with clerk or entered in minutes, and where defendant had ample time in which to rebut evidence, and subject-matter of deposition did not affect liability of defendant (Code Civ.Proc. § 283).

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Axel Skoglund against the Moore Dry-Dock Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco (Kirke La Shelle, Jr., of San Francisco of counsel), for appellant.

Alvin Gerlack, of San Francisco, for respondent.

PER CURIAM.

This is an appeal by the defendant from a judgment entered upon the verdict of a jury awarding plaintiff the sum of $4,000 for personal injuries suffered on the premises of defendant.

A number of points are urged in support of the appeal, namely, that the judgment is not sustained by the evidence, but is contrary thereto; that the trial court erred in denying defendant's motions for nonsuit, directed verdict and judgment, notwithstanding the verdict, and that the court committed error prejudicial to the defendant in permitting plaintiff to repudiate a stipulation of fact.

The position of appellant on these several points, except the one last mentioned, is based upon the argument that the evidence shows beyond dispute that the plaintiff, in entering and being upon the premises of defendant was a licensee, to whom it owed no duty except to abstain from willfully or wantonly injuring him; and that even if he should be regarded as an invitee, to whom it would owe the duty of ordinary care for his safety while on that portion of its premises where he had a right to be, the evidence shows that such care was in fact exercised by it, and also shows that the plaintiff himself was guilty of lack of ordinary care for his own safety which proximately contributed to his injury.

[1] A general verdict for the plaintiff imports a finding in his favor on all the averments of the complaint material to his recovery (Price v. Bekins Van & S. Co., 179 Cal. 326, 176 P. 452), so it is apparent that we have here present implied findings that the plaintiff's injuries, if he be regarded as a licensee, were willfully or wantonly caused by defendant; or, if as an invitee, that they were the result of defendant's lack of ordinary care, with no contributory negligence on plaintiff's part.

[2] In the determination of a motion for nonsuit it is the court's duty to resolve in plaintiff's favor all conflicts of evidence and to give him the benefit of all legitimate inferences therefrom. That being done, if it can then be said that there is in the case no

evidence of sufficient substantiality to support a judgment in plaintiff's favor the nonsuit must be granted, otherwise denied. The same rule with respect to the evidence applies in favor of the party against whom they are made in a motion for a directed verdict and a motion for judgment non obstante veredicto. Estate of Caspar, 172 Cal. 147, 155 P. 631. We will set forth the material evidence as affected by this general rule.

[3] The plaintiff, a man about 52 years of age, is a marine fireman and had followed that occupation for some thirty years, during which time he had on a number of occasions been with his ship in dock and shipyards and knew the general character of operations carried on there. He was so employed as a member of the crew of the steamer Vanguard, which on Saturday, December 24, 1932, entered the shipyard of the defendant situated on the north side of Oakland estuary, going there for repairs estimated to require about a week's stay. At about 5 o'clock in the evening of said day the crew, including plaintiff, were paid off, and the plaintiff was ordered by the chief engineer to report for duty at 8 o'clock the following Tuesday morning, the two intervening days being holidays. On leaving he mentioned to his chief that he would return on board Monday evening, to which suggestion or request the latter assented. The plaintiff then left the ship and went to San Francisco and there to a lodging house which he frequented during periods of unemployment, leaving on board in his berth his clothes, trunk, and belongings. Defendant's shipyard covers an area of forty acres, is surrounded on three sides by a fence, the fourth side being the waterfront, and contains wharves, docks, drydocks, buildings, shops, heavy machinery and appliances, piles of material, etc., such as are characteristic of a shipyard. The Vanguard was berthed on the west side of wharf No. 6, and on leaving it on said Saturday evening the plaintiff walked to the exit or entrance gate situated at the northwest corner of the yard. We may here say parenthetically that the appellant strenuously insists that the vessel was berthed on the west side of wharf No. 5; but in the view we take of the case, it makes no difference. Referring plaintiff's testimony to a diagram of the shipyard used on the trial and forming part of the record on appeal, the plaintiff on his way from the ship to the gate passed between two buildings—one the yard offices and the other the paint shop, which brought him into an alley running east and west at a point thereon which for the purpose of this opinion we will designate as A; he there turned west and proceeded until he reached a way running northerly and southerly between the plate shop and the storeroom and (without describing further points on the route) he reached the exit and proceeded to San Francisco, where he spent Sunday and Monday, returning in the evening of the latter day and arriving at the shipyard gate at about 7:45. The sky was overcast. At the entrance he was challenged by the gateman, but on stating that he belonged to the Vanguard he was allowed to pass in. To get to his ship he attempted to retrace his steps taken on his walk to the exit on Saturday evening, but when he arrived at the point which we have designated A on the alley running easterly and westerly, instead of turning south and going between the yard offices and the paint shop he continued along said alley. Reaching its end, he took a course southeasterly, which brought him to the head of wharf No. 7. He proceeded down this wharf, and when perhaps half way down he discovered, apparently for the first time, that he had missed his way. At this time he had walked a distance of about 500 feet from point A. He immediately turned and attempted to retrace his steps. In doing so he did not proceed far enough to reach the alley we have spoken of, but at a point en route he veered east, then southeast, which brought him into a dark area. He was now proceeding in the general direction of his vessel but across lots, so to speak, and between him and his vessel there lay drydock No. 4, into which, stubbing his foot against a loose plank, lying near the edge of the wharf, he was unfortunately precipitated, thereby receiving the severe injuries to recover damages for which he brought the present action.

It is apparent from the foregoing that the plaintiff, either by reason of forgetfulness, carelessness, or the insufficient lighting of the direct route from the shipyard entrance to his vessel, inadvertently left that route and wandered into dangerous territory. It is conceded by the appellant that if in going from the gate to his ship plaintiff was an invitee, it was its duty to provide him with a reasonably safe route between those points. It claims that it did so, and introduced evidence to that effect. However, one of the particulars of the charge of negligence against the defendant was that this route was insufficiently lighted; and one of the implied findings of the jury is that the

charge of negligence in this respect was sustained. If the record contains evidence which supports this charge, even though reasonable men might differ as to its effect, this implied finding of the jury must stand.

The plaintiff himself gave testimony on this subject. Having testified to the presence of a light immediately south of the general offices near the entrance to the shipyard sufficient to illumine an area in its vicinity, he then testified respecting what has been designated in the record by defendant's counsel as the second leg of the course taken by plaintiff to reach his vessel, and over which he had to walk whether the ship was berthed at wharf No. 5, as contended by defendant, or at wharf No. 6, as insisted by plaintiff. We give the following passage from his testimony on this point:

"Q. (By defendant's counsel): Now there is a light on the northeast corner of the plate shop shown right up here. Do you see that light there (referring to diagram)? A. Yes.

"Q. That was lighted that night, wasn't it? A. No, no light there.

"Q. You are sure that light was not lit? A. Yes.

"Q. You looked up and saw there was no light there, didn't you? A. No but I could see no light there.

"Q. Now, what would you say as to there being a light right up directly over the southeast end of the plate shop there? That was lighted that night, wasn't it? A. No sir, that wasn't lighted.

"Q. You are positive of that? A. Yes sir.

"Q. Did you go down this alley way between the store room and the power house and yard offices? Did you take that track down there? * * * A. Yes.

"Q. You came past the plate shop and past this light which you say was out? A. Yes.

"Q. And did you take this track down here? A. Yes.

"Q. And that was in darkness? A. Yes.

"Q. That same kind of darkness you described this morning when Mr. Gerlack was examining you? A. Well, you could seen the outlines of the buildings."

And speaking again of the route taken by him from the shipyard entrance to point A, he said: "I could see a little bit in front of me * * * it was not so dark but I could see some;" and in this connection he also stated that the nearest light to point A was near the entrance gate and general office, which, according to the diagram introduced in evidence, was distant about 600 feet with buildings intervening.

Another witness, Bradley, a fellow employee of the plaintiff on board the Vanguard, and who returned to the ship after dark on the same night that the plaintiff met with his mishap but reached it in safety, testified as to the route to be taken: "It was pretty dark."

There was, on the other hand, very positive and persuasive testimony introduced by defendant that the route to the vessel, whether it lay at wharf No. 6 or 5, was well lighted; but the rule is too well settled that the jury are the judges of the credibility of the witnesses and of the weight to be given their testimony for this court to say that the jury ought to have reached a different conclusion; and we think it apparent from the recital of plaintiff's testimony just given that it is sufficient to support the implied finding of the jury that the defendant did not observe ordinary care in furnishing to plaintiff in his capacity of invitee a safe route from the entrance to its shipyard to the vessel.

[4, 5] We come to appellant's contention that even if it be conceded that the plaintiff in proceeding from the shipyard entrance to his vessel was an invitee, yet when he wandered from the direct route to his ship into another part of the yard he lost his character of invitee and became merely a licensee, to whom as such no duty was owed but to refrain from willfully or wantonly injuring him; that the very character of a shipyard, with its wharves, and drydocks, and scattered buildings, heavy machinery, piles of material and the more or less disorderly condition of the premises arising from the nature of the activities there carried on, renders it a dangerous place for a person to be wandering around during the night, and that the qualities of willfulness or wantonness cannot be attributed to an injury suffered by such a person through tripping over a loose board lying on the ground adjacent to a dock.

This might be conceded to be true if the plaintiff's presence in this area was not due to the negligence of the defendant; but the implied finding of the jury that the plaintiff's presence there arose from the lack of sufficient illumination of his route to his ship, being, as we have seen, sustained by the evidence, this negligence on the part of

defendant must be held to be the efficient and proximate cause of plaintiff's injuries, and not the act of accidentally stumbling over the board. Such stumbling with its resultant injury was a peril directly resulting from such negligence, and cannot be regarded as an intervening, independent cause of the injury, although the nearest and most direct in point of time. Cahill v. E. B., etc., Stone Co., 167 Cal. 126, 138 P. 712. The elements of willfulness and wantonness do not, therefore, enter into the case.

[6] The appellant also points out that if plaintiff's route to his vessel was insufficiently illuminated, this fact was as obvious to the plaintiff as to the defendant, and argues that he was therefore negligent in proceeding, and that such negligence bars his recovery; and it makes a similar contention regarding plaintiff's efforts in the darkness to find his ship when he found that he had strayed from his course.

But to reverse the judgment on that ground, this court must hold that the plaintiff, in acting as he did, was negligent as a matter of law. This, obviously, we cannot do, for we think reasonable men might differ on the question whether a man of the age, condition, and experience of the plaintiff should have proceeded as he did, or, as suggested by appellant, ought to have returned to the gatekeeper and sought assistance or additional illumination.

[7] This still leaves for consideration the question whether the plaintiff was merely a licensee ab initio. It is argued by the appellant that in coming aboard the Vanguard on Monday night when he was only required to be at work at 8 o'clock on Tuesday morning he was doing so purely for his own purposes and convenience; that he ceased to be a member of the crew when he was paid off on Saturday afternoon, and that the order received by him from the chief engineer to resume work Tuesday morning was a re-employment, to take effect at that time; that, consequently, if for his own convenience or pleasure he returned earlier, he was until his duties recommenced but a licensee, to whom the defendant owed no duty of ordinary care.

It is conceded that if a member of the crew at this time he was as to the defendant an invitee. Bailey v. Texas Co. (C.C.A.) 47 F.(2d) 153. The contention of appellant as last set forth is, we think, based upon a very narrow and forced view of the situation. The chief engineer, plaintiff's immediate superior, was a witness in the case; and he testified that the plaintiff, though paid off on Saturday evening, was not laid off; that it was the same situation of a man working on shore who would be paid his wages on Saturday and told to come back on Monday or Tuesday. It is not disputed that he was a member of the crew at the time he was paid off. If such payment terminated his employment, he was immediately re-employed, and by accepting the employment he became obligated immediately to report for duty the following Tuesday, and thereby, we think, immediately resumed his former status. His clothes and belongings were on board in his berth and there remained. We think also that even if it could be held that he was not actually a member of the crew until he reported for duty, and the permission given him to come on board on Monday night be deemed a privilege accorded to him, it was one so obviously reasonable and in the interest of the employer that the owner of a shipyard who invites or solicits him to bring his vessel to his establishment for repairs should not be heard to say that a person standing in the relation to such owner as is here shown with regard to the plaintiff is not, in passing between his ship and the yard entrance, an invitee, but a mere licensee.

[8] This leaves for consideration the final point made by the appellant, namely, that the court committed error prejudicial to it in permitting plaintiff to repudiate a stipulation of fact.

On this point the record shows that prior to the trial the deposition of Andrew Proebstel, the chief engineer already referred to, was taken on behalf of the plaintiff. The latter's attorney of record was not able to be present, but sent a representative, who, however, was not an attorney of record in the case. During the taking of the deposition defendant's attorney requested of said representative a stipulation to the effect that the Vanguard from December 24 to 27, 1932, was berthed on the west side of wharf No. 5, to which request assent was given. During the trial, plaintiff's counsel, in presenting his case, offered said deposition in evidence. He himself read into evidence that part of it covering the direct examination, and the attorney of record for the defendant read into evidence that part covering the cross-examination, which latter part contained the report of the making of the stipulation in the manner stated. Upon such reading of the stipulation plaintiff's counsel made no objection, but a little later

put a question to one of his witnesses designed to show that the Vanguard at the time in question was berthed at wharf No. 6 and not at No. 5. The defendant objected to this evidence upon the ground that it was contrary to the stipulation, and, upon counsel for plaintiff stating that it was preliminary, he was allowed to introduce the testimony. The defendant then moved to strike it out on the same ground. The motion was denied.

From the foregoing recital of facts, it is seen that the stipulation was not in writing filed with the clerk of the court, nor, if regarded as orally made in the presence of the court, was it entered in the minutes, as required by section 283 of the Code of Civil Procedure.

This section of the Code was construed by the Supreme Court in Smith v. Whittier, 95 Cal. 279, 288, 30 P. 529, 530, where it is said: "The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding unless entered in the minutes of the court or filed with the clerk. * * * If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right, or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court."

In the case at bar, there appear to be no such circumstances. In the first place it was entered into by an unauthorized person under circumstances from which it may be inferred he knew nothing about the fact stipulated to and was relying upon the representation of the opposite party. The defendant was given ample opportunity to introduce evidence on the point covered by the stipulation after the plaintiff denied its validity, which he did, and this evidence was amply sufficient to prove the fact in question had the jury accepted it. No prejudice was shown, unless the necessity cast upon the defendant to prove the fact covered by the purported stipulation may be so regarded—which we do not think is the case. We think it clear that there was no error in admitting evidence at variance with such fact. And we have already adverted to the fact that the evidence in the case sustains the implied finding of the jury that the route to the ship's berth was insufficiently lighted, which finding applies as well to wharf No. 5 as to No. 6.

This disposes of the points urged by appellant. It results from what we have said that the judgment should be affirmed, and it is so ordered.

11 Cal.App.2d 217

MIDWICK COUNTRY CLUB v. LOS ANGELES COUNTY.

Civ. 9995.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1936.

1. Municipal corporations ⇐977

In action to recover taxes paid for benefit of fire protection district, evidence that test run from firehouse to plaintiff's property with fire apparatus was made in about four minutes *held* sufficient to sustain finding that plaintiff's property was not too distant to benefit from its inclusion in district (St.1923, p. 431).

2. Municipal corporations ⇐11

Purpose of County Fire Protection District Act is to provide fire protection to all property within districts organized under act (St.1923, p. 431).

3. Evidence ⇐5(2), 8

It is common knowledge that menacing fires often spread through uninhabited areas unless checked by fire trails or breaks, and that work of fire protection is not necessarily confined to providing equipment, facilities, and personnel for fighting fires already started.

4. Municipal corporations ⇐977

Plaintiff *held* not entitled to recover taxes paid for benefit of fire protection district on ground that plaintiff could receive no benefits from organization of district because of topography of territory and existence of practically uninhabited area between plaintiff's property and populous section of district (St.1923, p. 432, § 5).

5. Newspapers ⇐3(3)

Act providing for publication of notice of proposed formation of county fire protection district in newspaper circulated in proposed district *held* sufficiently complied with

by publication of notice in newspaper printed outside of and circulated in proposed district, where no newspaper was published therein, regardless whether newspaper was newspaper of general circulation (St.1923, p. 431, § 2; Pol.Code, §§ 4458–4460, 4462, 4463).

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by the Midwick Country Club against Los Angeles County. Judgment for defendant, and plaintiff appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action to recover taxes paid to defendant under protest, which taxes were levied for the benefit of the Belvedere fire protection district, organized under Statutes 1923, c. 191, p. 431. Judgment was entered in favor of defendant, and, from said judgment, plaintiff appeals.

Plaintiff states that the gist of the complaint is to the effect "that no benefit is or could be derived by the inclusion of its property in the Belvedere fire protection district." The main allegation on this subject was as follows: "That plaintiff further alleges that the lands, and improvements thereon, of this plaintiff * * * were so far removed and distant from the section or country known as Belvedere and so isolated that this plaintiff could not in any way be benefited by the incorporation or organization of such district, nor could it receive fire protection from such district." The trial court found that said lands and improvements "were not so far removed or distant from the section or country known as Belvedere, nor were they so isolated that plaintiff could not be benefited by the incorporation or organization of such district; and it is not true that plaintiff could not receive fire protection from such district." The trial court affirmatively found that plaintiff's land and improvements were so located in the proximity of Belvedere "as to be particularly and specially benefited by the organization and incorporation of such district and * * * as to be particularly and specially benefited by the fire protection afforded by such district."

[1] It is plaintiff's contention that the foregoing findings are not supported by the evidence, but we find no merit in this contention. There was ample evidence to show that fires had occurred in said district, some of them on plaintiff's property, and that said district, including plaintiff's property, was in need of fire protection. The uncontradicted evidence showed that a test run was made with the fire apparatus from the firehouse in the populous section of Belvedere to plaintiff's property, and that the time of said run, including receipt of the telephone call, was "a fraction over four minutes." We are of the opinion that such evidence alone was sufficient to sustain the findings contrary to the material allegations of plaintiff's complaint.

[2-4] We may further state, however, that we believe that plaintiff's argument is based upon a misconception of the nature and functions of a fire protection district. Plaintiff proceeds upon the theory that, because of the topography of the territory and the existence of a practically uninhabited area between plaintiff's property and the populous section of the unincorporated area known as Belvedere, plaintiff could receive no benefits from the organization of said district. Under section 5 of the so-called County Fire Protection District Act (St. 1923, c. 191, p. 432), the board of supervisors is empowered to do many things "and to perform all other acts necessary or proper to accomplish the purposes of this act." The obvious purpose of the act is to provide fire protection to all the property within the districts organized thereunder. It is a matter of common knowledge that menacing fires often spread through uninhabited areas of this state unless checked by fire trails or breaks, and that the work of fire protection is not necessarily confined to providing the equipment, facilities, and personnel for fighting such fires after such fires have started their devastation. But, even if the work of fire protection were so confined, we cannot assume that the board of supervisors would not use the taxes levied for the benefit of the fire protection district for the purpose of providing such fire-fighting equipment, facilities and personnel as might be required to afford adequate fire protection to all of the property within the district. How, then, can it be

claimed, as alleged in the complaint, that "this plaintiff could not in any way be benefited by the incorporation or organization of such district, nor could it receive fire protection from said district"?

Plaintiff states that the complaint herein was drawn "so as to conform to the rules enunciated" in Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage District, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392. Neither said case nor any other authority cited by plaintiff involved the organization of a fire protection district. Most of these authorities dealt with drainage district, flood control districts, and the like. The case above cited was decided upon the sufficiency of the pleadings. It was there alleged that the organization of the drainage district was "of no benefit to plaintiff's land" and that the district was formed "only for the benefit of the other lands." It was further alleged that "It was not intended nor has it ever been intended, nor was it possible nor is it possible, to give any of the benefits of the drainage scheme" to plaintiff's lands, and that plaintiff's land "never can or will in the future receive any benefit whatever from the system." In its opinion, the United States Supreme Court said that these allegations should be taken as true, and that "We are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." It is wholly conceivable that proof might be made of such allegations in an action involving the propriety of including certain lands in a district such as a drainage district, but it is difficult to see how similar allegations could be proved with respect to a fire protection district. But, even if we assume that there are circumstances under which similar allegations could be proved in an action involving a fire protection district, we believe it clear that the record in the present case is devoid of such proof. We conclude that the findings of the trial court upon the allegations of the complaint above set forth were amply supported by the evidence. In view of this conclusion, it is unnecessary to discuss defendant's contention that the findings of the board of supervisors regarding benefits were conclusive and defendant's further contention that plaintiff was barred from raising the question of benefits because of its failure to protest upon the hearing before the board of supervisors.

[5] Plaintiff further contends that "The notice required by the Fire Protection District Act was not properly published," but we believe this contention is likewise without merit. At the time in question, section 2 of the act provided as follows: "Thereupon said board of supervisors shall fix a time and place for a hearing of the matter of the formation of such county fire protection district and shall direct the clerk of said board to publish a notice once a week for two successive weeks in the newspaper circulated in the territory which it is proposed to organize into a fire protection district which said board deems most likely to give notice to the inhabitants thereof of the proposed formation of such district." No newspaper was published in the proposed territory, and the board directed that the notice be published in the Heights News, a newspaper printed and published in the city of Los Angeles and circulated in the proposed territory. It appears to be plaintiff's contention that publication should have been made in a newspaper of general circulation within the meaning of sections 4458, 4459, 4460, 4462, and 4463 of the Political Code, and that the Heights News was not such a paper. While we believe that the evidence showed said Heights News was a newspaper of general circulation for the purpose of said publication, it is unnecessary to discuss this question, as the act did not call for publication in a newspaper of general circulation within the meaning of the above-mentioned sections. The act contained a special provision regarding publication, and, as the publication was made in full compliance with the requirements of the act, it was sufficient. Palos Verdes Library District v. McClellan, 97 Cal.App. 769, 276 P. 600.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

HOGSETT v. BEVERLY HILLS SCHOOL DIST. OF BEVERLY HILLS et al.

Civ. 9846.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1936.

Hearing Denied by Supreme Court March 19, 1936.

Schools and school districts ⇐133

Teacher who served on probation for three consecutive years *held* not "reelected" by her employment as substitute teacher for two-thirds of each school day of the fourth year, so as to be entitled under statute to be classified as a permanent employee, since "re-election" in statute is one which results in retention of employee for another year in that class of employees to which employee re-elected belongs (School Code, §§ 5.401, 5.690; §§ 5.500–5.504, as added by St.1931, p. 1394; § 5.691, as added by St.1931, p. 716; § 5.520 as amended by St.1931, p. 1398).

Proceeding by Juanita M. Benoist Hogsett against the Beverly Hills School District of Beverly Hills, California, and others, for a writ of mandate compelling defendants to classify petitioner as a permanent teacher. From a judgment denying the writ and from an order refusing to vacate the judgment, plaintiff appeals.

Judgment affirmed, and appeal from order dismissed.

Gladys Towles Root and Edmund Nichols, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and William B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

Petitioner's case was presented to the trial court upon an agreed statement of facts. Having served in the schools of Beverly Hills school district for three complete consecutive school years, from 1929 to 1932, as a probationary teacher of music, that being a position requiring certification qualifications, and having been employed thereafter as a substitute teacher, petitioner claims the right to classification as a permanent employee, under the provisions of the School Code of California (sections 5.500 et seq. [as added by St. 1931, p. 1394 et seq.]). This classification was denied to her by the board of trustees of the school district and by the trial court.

On May 12, 1932, before the expiration of the third year of petitioner's employment, she was notified by the trustees of the school district that her services as a probationary teacher would terminate with the close of the school year, June 17, 1932, which notification came by letter reading in part as follows: "However, you will be offered a substitute contract as recommended by Mr. Hummel, which will provide you with an opportunity of teaching two-thirds of each day during the next school year. We regret that we are unable to keep all of our music teachers on full time." On May 24, 1932, a contract of employment was entered into between petitioner and the school district reading in part as follows:

"1. You are to be employed as a substitute music teacher (See paragraphs 2a, 2b and 2c below) in said school district for the school year beginning July 1, 1932 subject to the provisions of the statutes of the State of California and to all rules and regulations of said board relating to teaching service and kindred matters, including assignment subject to transfer as the needs of the schools require. * * *

"2a. Full-Time Teacher: Services shall be rendered by a regular full-time teacher in pursuant of said provisions governing salaries for such time subsequent to your assignment as school shall be maintained in said school district, during said school year, which time shall be determined hereafter by said board.

"2b. Partial-Time Teacher: Services shall be rendered by a partial-time teacher in pursuance of conditions named in paragraph 2 governing salaries, at the times and for the periods during said school year that shall be designated by the governing board not inconsistent with the following stipulations, to-wit: * * * the making and/or the termination of any assignment or transfer not inconsistent with the above stipulations shall be wholly optional with said board according to the needs of the district.

"2c. Substitute Teacher: Services shall be rendered by a substitute teacher from day to day only, during such portions of the school year above named as you may be assigned or transferred by said board to fill the position of a regular teacher absent from service. It is expressly understood that the employment of a substitute teacher is not for the full school year, but

only for such portions thereof as may be required of you, as aforesaid, and shall be a day-to-day employment. A substitute teacher shall be assigned or transferred after assignment, at the times and for the periods during said school year as shall be designated by said board, and compensation shall be paid for such time only as service is performed by the substitute teacher in pursuance of assignment and transfer ordered by the governing board. The acceptance of employment as a substitute teacher shall not be construed to render you ineligible to subsequent employment as a regular probationary teacher.

"3. The governing board will pay for services rendered at the rate specified in paragraph 2 above for each and every day, or portion of a day, during which you are actually engaged in rendering service, will pay for other time during the year named only as provided by the rules and regulations of the governing board in harmony with the laws of the State of California.
* * *

"5. Upon your acceptance hereof, you shall be under employment in the above named school district as a substitute teacher."

Thereafter during the school year of 1932–1933, petitioner rendered services as a teacher of music for two-thirds of each school day and two other music teachers did the same, that is to say, the three teachers divided equally among them the work of two full-time teachers, each teaching two-thirds of each day.

Petitioner's rights are governed by certain provisions of the School Code.

Section 5.500 reads as follows: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district."

Section 5.503 provides: "A probationary employee who in any one school year has served for at least seventy-five per cent of the number of days the schools of the district in which such employee is employed are maintained shall be deemed to have served a complete school year."

Section 5.690 provides: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to dismiss substitute employees at any time at the pleasure of the board."

Under section 5.691, as added by St. 1931, p. 1716, temporary employees may be dismissed at the pleasure of the board.

Petitioner's services as a probationary teacher had been completed. If she was "reelected for the next succeeding school year," the fourth year of her employment, she was entitled to classification as a permanent teacher at the commencement of her fourth year of service. If she was not so re-elected for the next succeeding school year, she was not entitled to that classification. The classes of teachers to be considered in this connection are the following: Permanent, probationary, and substitute teachers. School Code, §§ 5.510, 5.511, sections 5.500–5.504, as added by St. 1931, p. 1394, and section 5.520, as amended by St.1931, p. 1398. Permanent and probationary teachers are regular teachers having positions of their own. Substitute teachers are "those persons employed in positions requiring certification qualifications from day to day for less than one school year, to fill positions of regularly employed persons absent from service or who are employed in positions requiring certification qualifications in emergency or temporary schools or classes." Section 5.520, as amended.

It is necessary to determine what is meant by the word "reelected" as that word is used in section 5.500. There is a wide distinction between the status of probationary and permanent employees on the one hand, and substitute employees on the other; the former, as the classification indicates, have positions of their own from which they cannot be removed except for cause and after a hearing; the latter have no positions of their own but occupy, temporarily, positions belonging to probationary or permanent teachers. Furthermore, teaching as a substitute does not qualify one to become a permanent teacher. Wood v. Los Angeles City School Dist. (Cal. App.) 44 P.(2d) 644. Permanent or probationary teachers are employed for a year. Section 5.401. Substitute teachers are employed from day to day and may be dismissed at the pleasure of the board. Petitioner claims that when she was employed as a substitute teacher she was re-

elected within the meaning of section 5.500. We are unable to agree that this is true. We think the re-election intended by the Legislature is one which would result in the retention of the employee for another year in that class of employees to which the employee re-elected belongs; in other words, that the employee must be elected to a position of his own, having previously held either a probationary or a permanent position. From the fact that the re-election must be to a position requiring certification qualifications it is not to be understood that one is re-elected merely because he may be employed for some further period in any position requiring certification qualifications. The provision means no more than that re-employment in a position not requiring certification qualifications would not be the "reelection" required to bring the employee within the class of those entitled to permanent classification. The word "reelected" is found in section 5.401 and as used in that section it means that one who is elected to a position already held is "reelected." This re-election, as section 5.401 expressly provides, is not for a temporary period nor to a temporary position, but to a position which lasts throughout the year; that is to say, the re-employment is on a yearly basis. The word is not used in section 5.500 in any different sense. The employment of a probationary teacher to render future services as a substitute teacher would not amount to "reelection" within the meaning of the statute nor give the teacher a position of her own where she had been elected to fill only temporary vacancies in the positions of others.

We are also of the opinion that petitioner was not re-elected for the "next succeeding school year." Section 5.401 does not apply to the case of a teacher who is elected as a substitute, and petitioner cannot claim under that section a yearly employment. Sections 5.520 and 5.690 specifically apply to substitute employees. By the terms of the statute and the contract, as well, petitioner's re-employment was from day to day and not for a year.

Section 5.503 does not apply to the case. The provision of that section that a probationary employee, who serves at least 75 per cent. of the number of days that school is maintained in the district, shall be deemed to have served a complete school year, relates to the complete school year referred to in section 5.500. It defines what a complete school year is, which definition was lacking in the law prior to the adoption of section 5.503 as a new section by Statutes of 1931, page 1395. Petitioner's status is governed by the law and by the conditions of her re-employment. The number of days she may have served as a substitute teacher has nothing to do with her classification. The fact that she was allowed to work two-thirds of each school day is a mere circumstance. The board was under no obligation to furnish her employment if there were employed in the district sufficient regular teachers to do the necessary teaching. Whether petitioner worked one day during the year or every day makes no difference. In either case she was merely a substitute teacher. It appears that if petitioner had not been employed as a substitute teacher she would not have been re-employed at all. In fact, the board had refused to employ her in any other capacity. We cannot subscribe to the belief that she has been accidentally or inadvertently classified by the board as a permanent teacher. The board understood that petitioner was not being re-elected for the "next succeeding school year," and we think the board was undoubtedly correct in this understanding. Petitioner's contract expressly so provides. We believe there is no reason to doubt that the Code sections we have quoted were designed to give the board the right to employ a probationary teacher as a substitute teacher without giving her the status of a permanent teacher. Any other construction of the statutes, we think, would be unreasonable, as well as quite impracticable. The provisions of the School Code, providing for permanent tenure of employees, should receive a construction in harmony with their well-understood purpose to retain in their positions teachers and other employees who have demonstrated their fitness to fill positions created and maintained by school districts. The purpose is not to create new positions for teachers or other employees. Petitioner's claims are therefore unfounded and the court properly denied her the writ of mandate she sought.

The judgment is affirmed. The attempted appeal from an order refusing to vacate the judgment is dismissed.

We concur: HOUSER, P. J.; YORK, J.

11 Cal.App.2d 433

LUIKART v. McDONALD.

Civ. 9529.

District Court of Appeal, Second District, Division 1, California.

Jan. 27, 1936.

Banks and banking ⇐49(2)

Foreign statutory receiver of insolvent bank could sue resident stockholder for statutory liability (Const.Neb. art. 12, § 7, as amended in 1930; Const.U.S. art. 4, § 1).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by E. H. Luikart, receiver of the Citizens State Bank, Pierce, Nebraska, against G. E. McDonald. From an adverse judgment, plaintiff appeals.

Reversed.

Thomas A. Sanson and Thomas T. Robinson, both of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

HAUSER, Presiding Justice.

From the record herein, it appears that the judgment upon which the instant appeal is predicated was rendered by the trial court pursuant to an order of dismissal of an action that was brought by a statutory receiver of an insolvent Nebraska bank against one of its stockholders to recover a judgment against him because of his statutory liability as such stockholder. It also appears that the order of dismissal of the action was made in response to a motion to that effect that was presented by defendant and was based, not only upon the ground that plaintiff had not "the legal capacity to sue," but also "on the further ground that a special statutory remedy given by the laws of another state, for enforcing the statutory liability of the stockholders of a corporation organized under its laws, limits the liability, and where such remedy is not afforded by the laws of this state, the liability of the stockholders of such corporation cannot be enforced in this state against resident stockholders thereof."

In substance, the principal question presented on the appeal is whether a foreign statutory receiver of an insolvent corporation may sue a stockholder thereof, resident in this state, on account of the statutory liability of such stockholder. In principle the question is not new. Throughout the many jurisdictions within the United States, repeatedly it has been decided; and although in that regard the authorities are not entirely harmonious one with the other or the others, the weight of judicial opinion is largely in favor of the affirmative. In itself, to even cite the many cases that bear directly upon the issue here presented would be a task of some proportions; but to enter upon a statement of the particular facts that were involved in each of such cases and to attempt to either harmonize the respective conclusions reached therein, or to distinguish the various cases that favor the right of a statutory receiver to sue in a state other than that in which he received his appointment, from those that reject that principle, would require the expenditure of energy that would not be compensated by the result thereby to be obtained. Suffice it to say that, after due consideration having been given by this court to the pertinent general authorities, and especially to those of this state that bear directly upon the issue here presented, it is concluded that not only does the right of the foreign statutory receiver to sue in this state on a claim of stockholder's liability obtain by reason of comity, but as well, where local creditors would not be prejudiced thereby, to refuse the exercise of such right would be in contravention of the full faith and credit clause of the Federal Constitution (article 4, § 1). Ferguson v. Sherman, 116 Cal. 169, 47 P. 1023, 37 L.R.A. 622; Smith v. Shepler (Cal.App.) 48 P.(2d) 999; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Wright v. Phillips, 60 Cal.App. 578, 213 P. 288; Clarkson v. Moir, 53 Cal. App. 775, 201 P. 474; Bernheimer v. Converse, 206 U.S. 516, 27 S.Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann.Cas. 1913D, 1292; 14 Cor.Jur. 998; Fletcher on Corporations (Perm.Ed.) vol. 13, pp. 1036, 1037, 1038.

Respondent urges the point to the effect that by the provisions of the Nebraska law the remedy there prescribed is special, and for that reason is unenforceable in this state. The only basis for respondent's contention in that regard is that by the Nebraska laws the receiver is authorized to sue on a stockholder's liability for the benefit of creditors, and that no such spe-

cific remedial right obtains under the procedure in force in the state of California. In that connection it is noted that the pertinent language of the Nebraska constitutional provision is as follows: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, * * * and the receiver of said corporation or institution shall have full right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liabilities." Const.Neb. art. 12, § 7, as amended in 1930.

It is clear that where a corporation fails to pay its debts, a law by the provisions of which a creditor of the corporation is authorized to sue its stockholders for the purpose of compelling them to pay such debts, constitutes the remedy. Pomeroy, Code Remedies, p. 2 § 2; Bancroft, Code Practice and Remedies, vol. 1, p. 181. Obviously, the procedure that may be provided for the enforcement of such remedy is separate and distinct from the remedy itself; and the mere designation of a person who likewise may be authorized to institute a proceeding or an action in regard to such enforcement of the remedy works no change in the basic right of the creditor. Bernheimer v. Converse, 206 U. S. 516, 27 S.Ct. 755, 51 L.Ed. 1163; Converse v. Hamilton, 224 U.S. 243, 32 S.Ct. 415, 56 L.Ed. 749, Ann.Cas.1913D, 1292; Henley v. Myers, 215 U.S. 373, 30 S.Ct. 148, 54 L.Ed. 240; Luikhart v. Spurck (D.C.) 1 F.Supp. 53. An examination of the language of the constitutional provision in question discloses the situation that no special remedy, or even procedure, as such, is required for the enforcement of the liability of a stockholder. Providing that the necessary action shall be maintainable by a receiver, rather than by a creditor or creditors, has not the effect suggested by the respondent. The remedy afforded the creditor, through a receiver, to wit, that of compelling the stockholder to pay his debt, is not altered. Nor is the form of action provided by existing law modified in any particular. The right of enforcement of a contractual liability is simply lodged in a statutory officer in place of some private individual creditor who eventually may be benefited by the judgment sought to be obtained. Stockholder's liability is in the nature of an asset of the corporation as far as its creditors are concerned, and, manifestly, it is immaterial whether a creditor sue the stockholder directly, or whether some other person sue in behalf of the creditor and for his benefit. By well-settled law, it has been determined that the liability is contractual in character; and by many authorities, including that of Ferguson v. Sherman, 116 Cal. 169, 47 P. 1023, 37 L. R.A. 622 (wherein the authorities are reviewed), where that condition exists with reference to a claim that has arisen in one state, ordinarily an action upon such a liability may be maintained in any state where personal service of the complaint and summons in the action may be obtained on the defendant therein. See 5 Cal.Jur. 467, 468; Aldrich v. Anchor C. & D. Co., 24 Or. 32, 32 P. 756, 41 Am.St. Rep. 831; 14 Cor.Jur. p. 994, § 1538; §§ 177–180, Michie on Banks and Banking. Nor do the facts in the instant case present a situation that would justify the announcement of an exception to that rule.

It follows that the judgment should be, and it is, hereby reversed.

We concur: YORK, J.; DORAN, J.



BLAUTH v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al. *

Civ. 5575.

District Court of Appeal, Third District, California.

Jan. 20, 1936.

Certiorari ⇐5(1)

Superior court order requiring party appealing from superior court's confirmation of executrix' sale of realty to file appeal bond *held* appealable as "order made after final judgment," precluding resort to petition for writ of review (Code Civ.Proc. § 949, and § 963, subd. 2).

Proceeding on a petition for writ of review by Lillian Blauth against the Superior Court of California, etc., and others.

Petition denied.

* Vacated Jan. 24, 1936.

Busick & Busick, of Sacramento, for petitioner.

Horace B. Wulff, of Sacramento, for respondents.

Driver, Driver & Tade, of Sacramento, for respondent executrix.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon a petition for a writ of review seeking the order and judgment of this court annulling and setting aside an order of the superior court made and entered on the 3d day of January, 1936, in the Matter of the Estate of Julius Blauth, deceased, requiring the petitioner herein to file a written undertaking in the sum of $10,000, in support of her appeal in the matter of said estate, taken by petitioner from an order of the superior court theretofore made directing the sale of certain property belonging to the estate of said deceased.

The record shows that the executrix of the estate had given notice of the sale of certain real property; that a return had been made thereof; that objections to the sale had been filed; that a hearing had been had; and the sale as reported by the executrix confirmed. From the order confirming the sale, the petitioner herein appealed to the Supreme Court. Thereafter, upon petition of the executrix, the order was made which we have referred to, requiring the petitioner to file a bond in the sum of $10,000. The bond appears to have been required under and by virtue of the provisions contained in section 949 of the Code of Civil Procedure. However, from what will hereinafter be stated, it is unnecessary to decide whether that section permits the requiring of a bond under the conditions presented by the record in this case, for the simple reason that the petitioner has a remedy provided for by section 963 of the Code of Civil Procedure. That section provides, in subdivision 2 thereof, for the taking of an appeal from an order made after final judgment. The order involved in this case, and which the petitioner seeks to have set aside by this proceeding, appears to be an order taken after final judgment. Therefore the conclusion seems to be inescapable that the petitioner in this cause has a remedy by appeal.

In the case of Meserve v. Superior Court, 2 Cal.App.(2d) 468, 38 P.(2d) 453, 456, an almost identical question was presented. We do not need to recite the facts, but will set forth paragraph 6 of the opinion, which holds that an appeal lies from such an order, as follows: "If the superior court had jurisdiction to decide the motions in favor of petitioners, it would seem that it also has jurisdiction to decide such motions against them; or, in other words, it has the power to decide such motions even if its decision is wrong. Raine v. Lawlor, 1 Cal.App. 483, 82 P. 688. Again assuming that the superior court had jurisdiction to entertain the motions made by petitioners, in our opinion appeals would lie from the orders denying said motions, as upon special orders after final judgment; and, if the appeal did not act as a stay under section 949, Code of Civil Procedure, still it would be plain, speedy, and adequate, in view of the power of the appellate court to issue a supersedeas. Glougie v. Superior Court, 169 Cal. 675, 147 P. 972."

It follows from what has been said that the superior court had jurisdiction to pass upon the motion, and, even though it erred in requiring the giving of a bond and misconstrued the section, its jurisdiction was not thereby affected, and the remedy of the petitioner is by appeal from the order.

The petition should be denied, and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



11 Cal.App.2d 352

NELSON et al. v. MALCOLM.

Civ. 10651.

District Court of Appeal, Second District, Division 2, California.

Jan. 21, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Appeal and error ⇐1001(1)

Where there is evidence of substantial nature to sustain verdict, appellate court may not set aside judgment notwithstanding jury might have rendered contrary verdict on conflicting evidence.

2. Automobiles ⇐226(1)

Pedestrian's failure to yield right of way to automobile while crossing street at point other than within crosswalk precluded recovery for pedestrian's death (St.1931, p. 2127, § 131½).

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by Elma Nelson and others against John T. Malcolm. From a judgment for defendant, plaintiffs appeal.

Affirmed.

William Ellis Lady, of Los Angeles, for appellants.

Charles J. Kelly, of Los Angeles, for respondent.

GOULD, Justice pro tem.

In a suit for damages for wrongful death, jurors rendered their verdict against plaintiffs (appellants), widow and children of a pedestrian killed when struck by an automobile owned and driven by defendant. The evidence, appellants urge, is not only insufficient to support the verdict in favor of respondent, but is such that the verdict should have been for appellants.

[1] Without here recounting the testimony, we find in the record substantial evidence to support the implied findings of the jury in favor of respondent. It is true there was also evidence in favor of appellants' contention that the accident was due to the negligence and excessive speed of the automobile driver, and the jurors might well have rendered their verdict in appellants' favor; but an appellate tribunal may not set aside the result of the fact finders' deliberations where, as here, evidence of a substantial nature appears to sustain the verdict.

[2] The accident happened while the pedestrian was crossing a public street between intersections and at a point other than within a marked crosswalk. At the request of respondent the court instructed the jurors in accordance with the provisions of section 131½ of the California Vehicle Act (St.1923, p. 517) as amended in 1931 (St. 1931, c. 1026, p. 2127), that although neither driver nor pedestrian was relieved from the duty to exercise due care, it was nevertheless the duty of the pedestrian to yield the right of way to the vehicle, if the jurors found that the pedestrian at the time of the accident was crossing the street at a point other than within a marked crosswalk. The court also defined the term "crosswalk" in the language of the vehicle act. Appellants complain that the instruction was prejudicial and in effect told the jurors to find for the vehicle driver if the pedestrian did not keep out of his way. But the instruction to which objection is urged correctly states the law as found in the vehicle act, and has the authority of approval in such decisions as Chase v. Thomas (Cal.App.) 46 P.(2d) 200. In our opinion the trial court properly placed upon the jurors the duty of determining the facts and correctly expounded the law applicable to the situation presented by the issues involved.

Appellants also complain that certain instructions requested by them were refused. We deem it unnecessary to review these instructions in detail. Most of them are correct statements of abstract legal principles, some were inapplicable to the facts in this case and some were covered by other instructions. Viewed as a whole, we are of the opinion that the instructions given by the court fully and fairly apprised the jurors of the law governing the case.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 396

WILLIAMS v. SCHALK CHEMICAL CO.

Civ. 9744.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1936.

Hearing Denied by Supreme Court March 23, 1936.

1. Master and servant ⇐9

Written employment contract for definite period is on its expiration renewed for same term, in absence of contractual provision to contrary, or affirmative showing of absence of intention to renew contract, where parties continue relation of employer and employee (Civ.Code, § 2012).

2. Contracts ⇐313(1)

Action for damages for breach of contract may be brought before expiration of contract.

3. Appeal and error ⇐173(10)

Contention that action was premature in so far as discharged employee sought recovery of salary not due at time action was instituted could not be raised for first time on appeal.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by J. H. Williams against the Schalk Chemical Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Henry O. Wackerbarth and Henry E. Carter, both of Los Angeles, for appellant.

Call & Murphey and Walter E. Bennett, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent, plaintiff in this action, was employed by appellant as its sales manager under a written contract of employment for a term of one year from January 1, 1930, to December 31, 1930, at a fixed monthly salary plus a bonus. In December, 1930, a change was made by the corporation in its executive personnel, and a Mr. Colyear, vice president of the corporation, was apparently substituted as its active executive head. In that month, respondent inquired of Colyear as to a renewal of his contract and was told: "I am really not in direct charge here now, but the only thing I can see we can do is to continue the contracts as they are." Respondent continued to work and was compensated pursuant to said contract for the whole of the year 1931 and up to April 14, 1932, on which latter date he was discharged. Nothing was said in 1931 or at any other time about a renewal of the contract for the year 1932. On December 9, 1932, plaintiff filed a complaint in the instant case seeking judgment for $4,000, which represented his salary at the rate of $500 per month for the remaining eight months of his alleged contract for the year 1932, and in addition for a bonus of 3 per cent. of the net profits of appellant for the years 1931, 1932. The trial court found there were no net profits, but rendered judgment in favor of respondent for $4,000. The appeal is from that judgment.

[1] The decisive question presented on this appeal is whether, under the provisions of section 2012 of the Civil Code, a written contract of employment for a definite term is upon its expiration renewed periodically for the same term, in the absence of a provision in the contract to the contrary, or an affirmative showing that there was no intention to renew the same. This question has been answered in the affirmative. Henkel v. J. J. Henkel Co., 212 Cal. 288, 298 P. 28, 30; Louis v. Elfelt, 89 Cal. 547, 26 P. 1095; State Board of Agriculture v. Meyers, 20 Colo.App. 139, 77 P. 372; Williams v. John T. Hesser Coal Co., 207 Mo.App. 197, 231 S.W. 680; Dickinson v. Norwegian Plow Co., 101 Wis. 157, 76 N.W. 1108; Travelers' Ins. Co. v. Parker, 92 Md. 22, 47 A. 1042. In the Henkel Case, a written contract of employment for the period of one year was made in 1919. Without any other valid written extension, plaintiff in that case continued to work from year to year until he was discharged December 5, 1925. On the theory that his original contract was automatically renewed from year to year under the provisions of section 2012 of the Civil Code, and that defendant in that action was obligated to continue plaintiff's employment until June, 1926, pursuant to automatic renewal of the original written contract, plaintiff sued for damages and recovered. The court in that case said: "Section 2012 of the Civil Code reads: 'Renewal of Hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.' It is the contention of the defendant that, since the term relating to salary was changed as to the amount thereof, the provisions of the section do not apply; or, in other words, that a change in one of the terms destroys the presumption as to the other terms. We are unable to agree with the defendant's reasoning. It is not questioned that the first contract made was on a yearly basis, and *it must therefore be presumed that such a basis was continued until proof is presented that it was modified by the parties.* From the evidence the trial court was justified in holding that there was no modification of the contract with respect to the period of the time of employment. The only change that was made related to the amount of compensation, and, as to that provision, the presumption provided by section 2012 of the Civil Code is rebutted whenever proof is offered that the parties agreed upon a different salary." (Italics ours.)

It will be observed from the foregoing excerpt that in the Henkel Case the original terms of the contract were modified by increasing the salary provided for in the original contract. The court nevertheless held that the term of the contract was unaffected and that the contract, in so far

as the terms thereof were concerned, was automatically renewed from year to year.

[2, 3] Appellant has also argued that the complaint was prematurely filed in so far as it sought to recover for salary due for the month of December, 1932. Under the terms of the original written contract, it was provided that plaintiff's salary was "payable on the last day of each month of said term." The action is one for damages for breach of contract. An action of this kind may be brought before the expiration of the contract, as well as after. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Construing the action as one for recovery of wages, not for damages generally, appellant is now precluded from raising any question on that point, for the reason that there was no demurrer, no special defense, no motion to vacate any part of the judgment, nor any motion for a new trial specifically on that ground. In short, the question was not presented to the trial court in any manner, and it cannot be raised, in the absence of some such presentation as suggested, for the first time on appeal. Loomis, etc., Ass'n v. Calif. Fruit Exchange, 128 Cal. App. 265, 16 P.(2d) 1040; Seches v. Bard, 215 Cal. 79, 8 P.(2d) 835; Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

11 Cal.App.2d 382

MUTUAL LIFE INS. CO. OF NEW YORK v. MARGOLIS et al.

Civ. 5460.

District Court of Appeal, Third District, California.

Jan. 22, 1936.

1. Insurance ⇐146(3)

Where insurance contract refers to policy and application as entire contract, and incontestability clause provides policy shall be incontestable except as to provisions relating to disability benefits, an ambiguity exists, and such ambiguity must be resolved in favor of insured.

2. Insurance ⇐400

Clause in life policy providing that policy should be incontestable after one year except for nonpayment of premiums and provisions relating to double indemnity and disability benefits precluded contest of policy for fraud in its procurement.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by the Mutual Life Insurance Company of New York against Abraham S. Margolis and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frederick L. Allen, of New York City, F. Eldred Boland and Knight, Boland & Riordan, all of San Francisco, and J. R. Girling and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Arthur Rosenblum, of Los Angeles (Edgar C. Levey, of San Francisco, of counsel), for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiff to rescind, for fraudulent and untrue representations, two policies of insurance. These identical contracts of insurance were issued April 18, 1927, by the Mutual Life Insurance Company of New York in favor of respondent Margolis, and provided, first, for the payment of a fixed sum to a named beneficiary upon the death of the insured; secondly, for the payment to the same beneficiary of an additional specified sum if death was the result of an accident; and, lastly, for the payment to the insured of a specified monthly sum so long as he was totally and permanently disabled.

The policies were based upon and issued in reliance upon a prior written application wherein Margolis represented that he was in good health and had not suffered any illness nor been treated by a physician. In 1933 plaintiff discovered these representations were untrue and that Margolis was not in good health in April, 1927, and had been treated by a physician.

Thereupon plaintiff elected to rescind, and this action was commenced for the annulment and rescission of the provisions of the policies referring to the disability benefits After the first witness for plaintiff had been sworn, the court sustained an objection of

defendant to the introduction of any evidence. This objection to the introduction of evidence was based upon the ground that the complaint failed to state a cause of action; that the action was barred by the statute of limitations and by laches; that the contract of insurance was not severable or divisible; and that, by reason of an incontestability clause contained in the policies, plaintiff was precluded and estopped from rescinding or contesting the validity of the contracts of insurance.

The incontestability clause appearing in the policies is in the following words: "Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits, as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

Plaintiff contends that it has the right to contest and rescind the disability features of the policies by reason of the exception in the incontestability clause referring to the restrictions applying to the disability benefits. Respondent, upon the other hand, claims that the exception in the clause reserves only to plaintiff the right to contest, not the validity of the policy, but the restrictions and provisions set forth in sections 1 and 3 of the policy; and that, fraud not being mentioned or set forth as a restriction or provision in either sections 1 and 3 nor excepted in the incontestability clause itself, plaintiff is barred thereby from attacking the validity of the policies for alleged fraud in their procurement or inception.

Appellant urges two grounds for reversal: First, that fraud vitiates an insurance contract as it does any other kind of contract; and, secondly, the incontestability clause affects only the life insurance features of the contract.

The validity of a so-called incontestability clause in a contract of insurance is fully established in this state in the case of Dibble v. Reliance Life Insurance Co., 170 Cal. 199, 149 P. 171, 173, Ann.Cas.1917E, 34, which upholds the sufficiency of such provisions in a life insurance contract and quotes from many authorities to support its conclusion. It is there held, which answers the first contention of appellant, that such a clause in a contract of insurance does not waive all defenses and condone fraud, but, in so far as it allows a reasonable opportunity to discover the fraud and grants ample time to present the defense of fraud, it is only fixing a shorter period of limitation than that provided by the general statute of limitations, and acts as a further statute of repose, which in accord with well-established principles of law the Legislature can do. The Supreme Court said, adopting the opinion of Mr. Justice Burnett of this court: "It was not the object of the parties to said insurance policy to exempt the insured from the consequences of his fraud, but the object and effect of said incontestable clause was simply to provide a shorter term for maintaining said claim than is prescribed by the statute of limitations. In other words, in my opinion, by said section [1668, Civ.Code] the Legislature did not intend to condemn a contract that in the interest of repose and security would fix a reasonable limit for the time in which such defense might be successfully urged, but the intention was to preclude a contract that would altogether relieve either party of the consequence of his own fraud."

While the foregoing case is the only declaration of the rule in California, our task in deciding the issues presented in the instant case has been simplified by decisions of the federal courts wherein the same questions as have been raised here were met and considered, and, being in accord with the logic of Dibble v. Reliance Insurance Co., supra, we adopt the principles there so convincingly expressed.

In Ness v. Mutual Life Insurance Co. (C.C.A.) 70 F.(2d) 59, the insurance company sought to cancel the disability and indemnity provisions of two policies of insurance wherein the incontestability clause was identical in phraseology with the clause in the case at bar, and sections 1 and 3 of the policy referred to in that case were likewise identical in phraseology with sections 1 and 3 of the policies here under examination. In the Ness Case the trial court specifically found the policy was obtained by means of fraud and misrepresentation, but nevertheless Judge Parker of the United States Circuit Court of Appeals for the Fourth Circuit, interpreting the language of the incontestability clause, held that there was no ambiguity in the incontestability clause, and such clause precluded any defense that the indemnity and disability provisions were procured by fraud, and precluded a contest of the policy on any grounds which were not specifically excepted in the incontestability clause itself.

The incontestability clause here provides that the policy shall be incontestable after one year from its date of issue, except, first, for the nonpayment of premiums; and secondly, except "for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3, respectively. * * *"

Briefly summarized, these restrictions and provisions in section 1 are that, upon proof that insured died as a direct result of bodily injury, effected solely through external, violent, and accidental means, independently and exclusively of all other causes, and that, except in cases of drowning or asphyxiation, there is evidence of a visible contusion or wound, that death occurred within 90 days after the injury, and that the death did not result from self-destruction, or from military or naval service in time of war, or riot, or from participation in aeronautics, or from disease or bodily or mental infirmity, double indemnity will be paid. This section also contains provisions as to right of examination of the body and to perform an autopsy.

Section 3, relating to disability benefits, defines total and permanent disability, and is followed by a provision that the disability benefits and waiver of premiums shall be granted if the insured, before attaining the age of 60, and while no premium is in default, shall furnish the company due proof of disability. Then a number of general provisions relating to disability benefits with restrictions as to certain activities of the insured are given.

The opinion in the Ness Case then proceeds to analyze the exceptions, and points out that the effect of the second exception is merely to preserve the rights of the company under the restrictions and provisions specifically set forth in sections 1 and 3. The purpose of the second exception as found by the court was "to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. Thus the right was reserved to contest, under section 1, liability for double indemnity in case of suicide or death resulting from military or naval service or from engaging in felony. And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished. * * *" The court further pointed out that the clause was dealing with defenses which might be asserted to the policy, and the exceptions were intended to except certain defenses which were enumerated in sections 1 and 3, which exceptions are not to the double indemnity or disability benefits but to the restrictions and provisions applying to the double indemnity and disability benefits.

Following the Ness Case, both chronologically and in principle are Mutual Life Insurance Co. v. Markowitz, 78 F.(2d) 396, and New York Life Insurance Co. v. Kaufman, 78 F.(2d) 398, both of which involved the same questions and the identical language in the incontestability clause as was used in the instant case, and which are both decided in the United States Circuit Court of Appeal for the Ninth Circuit, and in both Judge Denman was the author of the opinion. Also we refer to Thompson v. New York Life Insurance Co. (D.C.) 9 F.Supp. 248; New York Life Insurance Co. v. Truesdale (C.C.A.) 79 F.(2d) 481; Kiriakides v. Equitable Life Assurance Soc., 174 S.C. 140, 177 S.E. 40; Wilson v. Equitable Life Insurance Co. (Iowa) 262 N.W. 525.

[1] It is unnecessary to quote from the foregoing authorities, but a brief résumé may not be out of order. In New York Life Insurance Co. v. Kaufman, supra, the action was for cancellation on the ground of fraudulent concealment by the insured in regard to his prior health and medical history. The trial court found the existence of fraud, and the permanent total disability of the insured, and held that the incontestability clause was not applicable to the disability portions of the contract, and directed that defendant take nothing, canceled the disability insurance, and directed the defendant to repay to the company the amounts already received as benefits. On appeal, it was held that, where the contract refers to the policy and application as the entire contract, and the incontestability clause provides the policy shall be incontestable except as to the provisions and conditions relating to disability benefits, an ambiguity exists, and must therefore be resolved in favor of the insured. That this is the rule there can be no doubt. Mr. Justice Stone, in the case of Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U.S. 80, 54 S.Ct. 590, 592, 78 L.Ed. 1137, states the rule and reason thus: "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a

lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted * * * and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

[2] In the case of Northern Life Insurance Co. v. Christie, 179 Wash. 88, 36 P. (2d) 73, 74, arising in the state of Washington, an action by an insurer was brought to cancel and rescind a policy of accident and health insurance on the ground of fraud in procuring the same and to recover back moneys paid out in monthly indemnities. The insured relied upon the incontestability clause in the policy, which read: "Incontestability—This policy shall be incontestable after one year from date of policy, except for the non-payment of premium or service in army or navy in time of war." The court there held that such incontestability clause applied to the entire policy which was made up of provisions affecting life, health, and accident protection.

We believe no further citation of authorities need be enumerated, as those herein referred to clearly express the rule as this court conceives the rule to be. The judgment from which the appeal is taken is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



11 Cal.App.2d 388

PEOPLE v. CHAVEZ.

Cr. 1861.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1936.

Rehearing Denied Feb. 7, 1936.

Hearing Denied by Supreme Court Feb. 20, 1936.

1. Criminal law ⇐998

Verdict or judgment which is not void on its face cannot be attacked on motion to annul, since any error occurring therein must be raised on appeal from judgment, and, if not so raised, will be deemed waived.

2. Criminal law ⇐998

Where information charged burglary in first degree and showed felonious entry into dwelling in nighttime, verdict of "guilty of burglary in the first degree" and judgment thereon *held* not void on their face and hence not open to attack on motion to annul, since verdict imported conviction of offense charged in information (Pen.Code, §§ 459, 460, 1151, 1157; Const. art. 6, § 4½).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Edward Chavez was convicted of first-degree burglary, and from an order denying a motion to annul, vacate, and set aside a judgment and commitment, he appeals.

Affirmed.

Edward Chavez, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

This is an appeal from an order denying a motion to annul, vacate, and set aside a judgment and commitment.

The defendant and appellant was tried upon an information charging the crime of "burglary in the first degree." The jury found the defendant guilty of "burglary in the first degree," and upon that verdict judgment was entered on March 9, 1935, and the defendant was duly committed to the state prison at Folsom. He did not ask for a new trial and took no appeal from the judgment. On August 14, 1935, he filed a motion to annul, vacate, and set aside the judgment and commitment on the ground that the judgment and commitment were null and void because the verdict was not sufficient to sustain the judgment.

[1] Appellant's point is that since the information pleaded a certain set of facts designated in the Code as constituting burglary in the first degree, it was necessary for the jury to find the truth of those facts pleaded and against every other element specified in the Code as constituting that crime. It must, of course, be conceded that unless the verdict or judgment is void on the face, it cannot be attacked in this motion to annul; any matter of error occurring therein must be raised on an appeal from the judgment, and if not so raised, it will be deemed to have been waived.

[2] The information charged the offense of "burglary in the first degree." It then pleaded facts showing a felonious entry into a dwelling house in the nighttime. The verdict read "guilty of burglary in the first degree." This was all that was necessary under the statute. In finding the defendant "guilty," the verdict imported a conviction of the offense charged in the information. Section 1151, Pen. Code. This offense was the crime defined as "burglary" in sections 459 and 460 of the Code. If that offense had not been segregated into first and second degrees, the verdict need have said nothing more than "guilty." It was, therefore, by reason of section 1157 alone that the jury was required to find "the degree of the crime of which he is guilty." This the jury did when it added to its verdict "in the first degree." People v. O'Neal, 2 Cal.App.(2d) 551, 557, 38 P.(2d) 430; 8 Cal.Jur. p. 406. For these reasons neither the verdict nor the judgment which is based upon it is void on the face, and hence neither is open to attack upon this motion to annul.

Appellant lays stress upon People v. Tilley, 135 Cal. 61, 67 P. 42, and other cases which preceded section 4½ of article 6 of the Constitution. These cases which followed the rule of strict interpretation, and which were reversed on a meager showing of error, were decided upon an appeal from the judgment. None supports the argument of appellant that the verdict here in question was void upon its face.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 359

Ex parte MARCUS.

Cr. 327.

District Court of Appeal, Fourth District, California.

Jan. 21, 1936.

1. Criminal law ⇐1001

Statutory power of court to revoke or modify order of suspension of imposition or execution of sentence at any time during term of probation applies generally to order granting probation, and is not limited to term thereof (Pen.Code, § 1203).

2. Criminal law ⇐1001

Under statutory power of court to revoke or modify order of suspension of imposition or execution of sentence, conditions other than length of term of probation may be enlarged before such conditions have been fully complied with (Pen.Code, § 1203).

3. Criminal law ⇐1001

Order requiring defendant to spend one of three years of probation in county jail in lieu of and before expiration of jail term of 60 days imposed in original probation order *held* "modification" of original order within statute authorizing court to modify probation order, and hence within jurisdiction of court in absence of showing that change exceeded reasonable limits or was not warranted by circumstances (Pen.Code, § 1203).

[Ed. Note.—For other definitions of "Modification," see Words & Phrases.]

Proceeding in the matter of the application of Michael J. Marcus for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Julian Thurston, of Pioche, Nev., for petitioner.

Thomas Whelan, Dist. Atty., and Harold P. Curtis, Deputy Dist. Atty., both of San Diego, for respondent.

BARNARD, Presiding Justice.

The petitioner seeks his release from custody on a writ of habeas corpus. He was charged with the commission of three separate felonies and pleaded guilty to each charge. His application for probation was granted, the same to run concurrently on all three charges, and he was placed on probation for three years beginning August 16, 1935, with the condition that the first sixty days of that period be spent in the county jail of San Diego county. On September 27, 1935, a so-called modified order was entered by the court purporting to modify the original order granting probation by requiring him to spend one year in the county jail beginning on August 16, 1935, in lieu of the former term of sixty days.

The only point raised is that the modified order entered on September 27, 1935, was

in excess of the court's jurisdiction and that the same is null and void because the court was without power to change the length of the jail term as fixed in the original order. It is therefore argued that since the petitioner has now been confined in jail for a time in excess of that named in the original order he has complied with the only condition which the court had the power to make in that connection and is entitled to a discharge.

The petitioner relies on the case of In re Hazlett, 137 Cal.App. 734, 31 P.(2d) 448, as decisive of the question now before us, and argues that the change here made must be regarded, not as a modification of the original order granting probation, but as an attempt to add a new condition thereto, and that the same is void.

[1, 2] In the order involved in the case just referred to, the court extended the period of probation and at the same time pronounced judgment and sentence, the sentence to run concurrently with the period of probation. The order also had the effect of adding another term in jail as a new condition after a condition of the same kind and character imposed in the original order had been fully complied with. It was there held that while the court had the power to extend the term of probation, it could not impose another term in jail as a new condition after the original condition of that nature had been fully complied with. Nothing further was there decided, and we think this case may not be taken as holding that a condition in an order granting probation, requiring a portion of the time to be spent in jail, may not be modified by extending the period to be thus served when such change is made before the original condition has been fully complied with.

Section 1203 of the Penal Code, upon which the power of the court in such a matter is based, includes the following: "The court shall have power at any time during the term of probation to revoke or modify its order of suspension of imposition or execution of sentence." In Ex parte Sizelove, 158 Cal. 493, 111 P. 527, it was held that the power to modify the order, thus conferred, includes the power to enlarge the probationary term at any time before that term has expired. The power to modify, given by the statute, applies generally to the order granting probation and is not limited to the term of probation. If the order granting probation may be modified by enlarging the term at any time before the original term has expired, we see no reason why other conditions imposed may not be modified by enlarging the same if this is done before such conditions have been fully complied with. This was done in the case of In re Glick, 126 Cal.App. 649, 14 P.(2d) 796, 797, where a condition requiring an indefinite confinement in a sanitarium was so changed as to provide for a definite term in jail. In that case the court said: "The court had a right to amend or modify the terms of probation within limits, and the modification was within these terms." A similar course was approved in the case of People v. Roberts, 136 Cal.App. 709, 29 P.(2d) 432, where an original condition requiring the defendant to remain in a certain home for a period of one year was, at the end of three months, modified by substituting a condition requiring confinement in the county jail for a period of one year.

[3] We think the order here complained of was a modification of the original order and not the imposition of a new condition within the meaning of this statute as thus far interpreted in the decisions. The court has power to modify its order under proper circumstances and within reasonable limits, and nothing here appears to show that the change here made exceeded such limits or that it was not warranted by the circumstances. It follows that the court did not exceed its jurisdiction in modifying its order by enlarging this particular condition before that portion of the original order had been fully complied with.

The writ is discharged, and the petitioner remanded.

We concur: MARKS, J.; JENNINGS, J.

PARRETT et al. v. CAROTHERS et al.

Civ. 10187.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1936.

Rehearing Denied Feb. 10, 1936.

Hearing Denied by Supreme Court March 12, 1936.

1. Automobiles ⇐244(20, 35)

Evidence, in action for death of occupant of automobile in intersection collision, sustained finding as to negligence of drivers of both of colliding automobiles, where there was proof of excessive speed of one driver and that other, after seeing first automobile, could have stopped before reaching intersection.

2. Appeal and error ⇐1001(1)

Finding of jury based on sufficient evidence is binding on reviewing court.

3. Automobiles ⇐244(20)

Evidence of failure of driver of automobile to stop on seeing another vehicle approaching intersection rapidly from cross street *held* insufficient to establish willful misconduct within statute limiting liability for injuries to guest (St.1931, p. 1693, § 141¾).

4. Automobiles ⇐181(2)

Real estate broker, riding in another broker's automobile on trip taken by both to inspect property which might be available for exchange for property of first broker's principal, *held* not "guest" of second broker within statute limiting driver's liability for injuries to guest, where second broker expected to make commission in case property to be inspected should be taken in exchange (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

5. Automobiles ⇐181(2)

Automobile "guest," within statute limiting liability of driver, is one who takes ride for his own pleasure, or on his own business without making return to, or conferring benefit upon, driver; while person who renders value received, or gives such recompense as would make it worth driver's while to give the ride, is "passenger" (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

6. Death ⇐99(1)

$5,000 for death of 65 year old real estate broker *held* not excessive, notwithstanding absence of direct evidence as to earning capacity, where evidence was uncontradicted that deceased had an established business, enjoyed good health, and was industrious and generous to his family.

7. Appeal and error ⇐1064(1)

Instruction, in intersection collision case, that driving vehicle over 25 miles an hour in business district, or more than 15 miles per hour across obstructed intersection, was unlawful, though erroneous, *held* not prejudicial, where negligence of defendant drivers was clearly shown and there was no evidence that either acted on assumption that other would slow down (St.1931, p. 1436, § 113 (c).

8. Appeal and error ⇐1032(3)

Miscarriage of justice must affirmatively appear to warrant reversal for error in giving or refusing instructions.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Louise G. Parrett and others against Archibald D. Carothers and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

See, also, 4 Cal.App.(2d) 724, 41 P. (2d) 595.

Mathes & Sheppard, and Robert A. Cushman, all of Los Angeles, for appellants Warren A. Rix and Lenore V. Rix.

Kidd, Schell & Delamer, of Los Angeles, for appellants Archibald D. Carothers and M. A. Newmark & Co.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn and George W. Tackabury, both of Los Angeles, of counsel), for respondents.

SHINN, Justice pro tem.

Appeal by defendants from a judgment after verdict in an action for damages resulting from an automobile collision. Plaintiffs are the heirs at law of Homer C. Parrett, deceased, whose death resulted from a collision between an automobile operated by Warren A. Rix and owned by Lenore V. Rix, and an automobile owned by defendant M. A. Newmark & Co. and being operated by defendant Archibald D. Carothers, with the consent and as the employee of defendant M. A. Newmark & Co., and within the scope of his employment. Upon a verdict of a jury judgment was entered in favor of the plaintiffs, and against the owners and operators of each car, from which judgment all of the defendants appeal.

The Rix car, traveling east upon Cashio street, approached the intersection of Durango avenue, and in the intersection struck the Carothers car, which had approached on Durango from the south. The accident occurred about 1 o'clock in the afternoon. Each street is thirty feet wide between curbs. Upon the southwest corner of the intersection was a house which partially obstructed the view of each driver.

[1, 2] The contention of defendants Carothers and M. A. Newmark & Co. that no negligence on the part of Carothers was shown may be briefly disposed of. There was evidence that Carothers approached the intersection at a speed of approximately thirty-five miles per hour, increasing that speed as he neared the intersection, and that he did not slow down before the impact of the two cars. There was also testimony that he had stated that he did not see the Rix car until he was entering the intersection. There is other testimony that he was driving without due regard to the surrounding conditions and without having his car under control. The undisputed evidence was to the effect that from a distance of seventy-five feet south of Cashio he could have seen westerly on that street for a distance of seventy-five feet, from a point fifty feet south he could have seen eighty-five feet, and from a point twenty-five feet south he could have seen for two blocks to the west. At a speed of fifteen miles per hour he could have stopped his car in about fourteen feet. The point of impact was four or five feet north of the center line of Cashio street. The jury was justified in finding him negligent in entering the intersection at a high rate of speed and without having made careful observations as to the traffic approaching from other directions. The evidence of the negligence of Carothers is quite sufficient. His contention that any acts of negligence on his part were not the proximate cause of the accident has been resolved against him by the jury, and their conclusion, based upon sufficient evidence, is binding upon this court.

As to the evidence of negligence of defendant Warren A. Rix: This witness testified that he was driving at the rate of about fifteen to eighteen miles per hour as he approached the intersection. There was testimony to the effect that he was driving thirty miles per hour shortly before he reached the intersection. He also testified that he was twenty or thirty feet west of Durango when he first saw the Carothers car and that Parrett called out to him, "Look out, he is going to hit us. He is going to kill us"; that he saw the Carothers car at just about the time Parrett called out. He testified that the Carothers car, when he first saw it, was seventy or eighty feet south of the intersection and that it was going about thirty-five miles per hour and that he next saw it just as it reached the intersection and that it seemed to speed up after he first saw it and did not slow down at any time. The cars came together with a violent impact. The Rix car was overturned and the Carothers car was shoved sideways to the northeast corner of the intersection, where it knocked down a lamp post, skid marks showing that one or both cars skidded about twenty-nine and one-half feet. There was testimony to the effect that skid marks made by the two cars started eleven feet east of the west curb line of Durango and upon the north half of Cashio street. There was testimony that if Rix had been traveling as slowly as fifteen or twenty miles per hour he could have stopped his car within seventeen or twenty-four feet. After he saw the Carothers car he had ample room in which to stop the car before he reached the intersection. Even at twenty-five miles per hour he could have stopped before reaching the point where the impact occurred. It was in evidence also that from a point fifty-five feet west of the westerly curb line of Durango there was an unobstructed view of Durango avenue to the south for a distance of eighty-five feet. The three other street corners were vacant, affording unobstructed views. There was no evidence of other traffic which might have confused the drivers or diverted their attention from the dangerous southwest corner. This evidence is sufficient to support a finding that defendant Rix was negligent. Or, taking another view of the situation, namely, that the Rix car approached and entered an intersection where the view was partially obstructed at a speed of approximately thirty miles per hour, can it be questioned that this was negligence? Manifestly not. And likewise, where a driver of an automobile sees another car approaching from his right at a speed of thirty-five miles per hour and at a distance of seventy-five or eighty feet from an intersection and un-

der such circumstances that a collision will occur if one car or the other is not slowed down and brought under control in order to allow the other to pass, and the driver does not bring his car under control but proceeds until it is too late to avoid a collision and strikes the approaching car on the side thereof with great force, the finding of a jury that he was guilty of negligence will not be disturbed.

[3] It is contended by appellants Rix that the evidence fails to show willful misconduct on the part of defendant Warren A. Rix, and that the judgment against them cannot be sustained upon an implied finding of willful misconduct. With this we agree. It must be conceded, as respondents contend, that the Rix car could have been stopped at a place of safety after Rix had been warned by Parrett of the approach of the Carothers car, but the conduct of each of the drivers was such as is ordinarily encountered in cases where two automobiles come together at an intersection. It is characterized by a failure to appreciate and to guard against impending danger. It evidences laxity, inattention, and a failure to respond to the dictates which control the conduct of careful persons, but it does not bear the earmarks of that deliberate and intentional action, in the face of imminent danger and probable injury, which is essential to establish willful misconduct. A review of the decisions of the appellate courts of this state, in which the claim of willful misconduct has been upheld, will disclose that in each case there was present evidence of intentional progress toward impending danger showing a scornful disregard of threatened disaster. Rix did not see the approaching car until he was within twenty-five or thirty feet of the intersection. The one fact that he failed to stop his car within the distance it traveled, forty-three feet, to the point of collision, is not evidence of willful, intentional wrong. The case clearly falls within the principles recently announced by the Supreme Court in the case of Meek v. Fowler, 45 P.(2d) 194.

[4, 5] The next point relates to the question of liability of defendants Rix for simple negligence in the operation of the car. Inasmuch as willful misconduct was not shown, these defendants were not liable for the death of Parrett if the latter was a guest within the purview of the California Vehicle Act, § 141¾ (St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693). The term "guest" is there defined as "a person who accepts a ride in any vehicle without giving compensation therefor." The argument of respondent upon this branch of the case proceeds upon the theory that Parrett and Rix, as real estate brokers, were engaged in negotiating an exchange of real estate for their principals. A discussion of this point requires a statement of the circumstances under which Rix undertook to transport Parrett to Culver City. Parrett and Rix were real estate brokers. Rix and another broker, as agents, had submitted to Parrett, as agent for one Giroux, business property, known as the Fife property, in exchange for real property owned by Giroux, who had considered the offer and refused to make the offered exchange. Parrett telephoned to Rix about another piece of property suggesting that the two of them go to see it in connection with the Giroux matter. Rix then made an appointment for Parrett to meet him the following Saturday, the day of the accident, for the purpose of inspecting the property. It was while they were on this mission that the accident occurred. It further appears from statements made by Rix that he expected to receive a commission from his principal and understood that Parrett would receive one from Giroux in case an exchange should be consummated. The evidence sufficiently shows the following facts: That the trip to Culver City was for the mutual benefit of the real estate brokers. It was necessary to find a suitable property for Parrett's client Giroux, in order to bring about an exchange by reason of which the brokers would have earned a commission. The property submitted by Rix and Levy had been refused and it was necessary for Rix to have something new to offer. If a satisfactory property should be found, both brokers would profit; otherwise their efforts would have been fruitless. If Parrett placed Rix in touch with the owner of a property which Giroux accepted in exchange for his property, Rix would have profited directly by the assistance of Parrett. The advantage of an opportunity to participate in the negotiations was conferred by Parrett upon Rix when he proposed the inspection of property in Culver City in connection with the "Giroux matter," just as it would have been to the advantage of some other broker to be invited into the negotiations

by Parrett and to be made acquainted with the Culver City property, with a view to its being offered to Giroux. If the deal had been made, the broker who had been so invited, whether he be Rix or another, would have had Parrett to thank for any remuneration he would have received for his services. There was no social relationship between Parrett and Rix and no intimate friendship. They were interested in doing business together and the trip was being made purely for business reasons. It was not in any sense a pleasure trip.

The distinction between a guest and a passenger, as established by the authorities, may be summarized as follows: A "guest" is one who takes a ride for his own pleasure or on his own business without making any return to or conferring any benefit upon the driver of the car; one who is rendering value received, in whatever amount, and who gives such recompense for the ride as may be regarded as compensation therefor, that is to say, a return which may make worth while the giving of the ride, is a mere passenger and not a guest. This distinction is substantially declared in the following cases: Haney v. Takakura, 2 Cal.App. (2d) 1, 37 P.(2d) 170, 174; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; Smith v. Fall River, etc., District, 118 Cal.App. 673, 5 P.(2d) 930; Sullivan v. Richardson, 119 Cal.App. 367, 6 P.(2d) 567; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.(2d) 159. The conclusion seems to us inescapable that Rix expected to profit by the trip to Culver City. Had the case been otherwise the journey would not have been undertaken. It follows from these views that there was a liability upon the part of Warren A. Rix and consequently upon the part of Lenore V. Rix, the owner of the car which was being driven with her consent, by reason of the negligent manner in which the car was operated. It therefore becomes unnecessary to decide whether the owner of an automobile is liable for the misconduct in the operation thereof of one to whom it is loaned.

[6] It is contended by appellants Rix that the verdict was for an excessive amount, namely, $5,000. These appellants rely in making this point upon the fact that no direct evidence was given as to the earning capacity of the deceased nor as to the amount he contributed to the support of his family. They contend that in the absence of such evidence there was no basis whatever upon which the jury could assess damages and they maintain that the jury should not have been allowed to consider the element of loss of support. Deceased was 65 years of age, his wife 57; there were three children, aged 32 years, 29 years, and 27 years respectively. Mr. and Mrs. Parrett had been married 37 years, during which time they had lived together and raised their family. Mr. Parrett had enjoyed unusually good health all of his life and was in good health on the day of the accident. He had been engaged in the business of real estate broker for something over 18 years; he was industrious and a tireless worker. The entire family was living together at the time of the accident and they had so lived for many years. Mr. Parrett was kind and generous and in all respects a loving and exemplary husband and father. His expectancy of life was 11.10 years. These facts were testified to by one witness, and under stipulation of counsel they must be regarded as having been testified to by all of the members of the family, as it was stipulated that they would so testify if called as witnesses. The contention that the record was without evidence upon which the jury could find that the family of the deceased suffered pecuniary loss by reason of the deprivation of his support is without foundation. It would be strange indeed if any jury or court would need further facts than those we have related in order to reach a conclusion that the family of the deceased had been supported by his earnings and would have been supported in the future to the extent of his ability. A court or jury could not justly disregard the undisputed evidence as to the relationship of the deceased toward the members of his family and household and the reasonable and natural inferences to be drawn therefrom. But one conclusion could reasonably be reached, namely, that he had been able to fulfil and had fulfilled the natural and legal obligations of a husband and father, and that those conditions would have been continued, but for his untimely death. It may properly be recalled that this event occurred while he was actively engaged in following an occupation to which he had devoted the last eighteen years of his life. The views we have expressed upon this point find support in the following cases: Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 P. 72; Worden v. Central Fireproof Bldg. Co., 172 Cal. 94, 155 P. 839; Evarts v. Santa Barbara, etc.,

Ry. Co., 3 Cal.App. 712, 86 P. 830; Washington v. Pacific Elec. Ry. Co., 14 Cal. App. 685, 112 P. 904; Duffield v. Payne, 66 Cal.App. 767, 227 P. 217; Holmes v. California Crushed Fruit Co., 69 Cal.App. 779, 232 P. 178.

All of the appellants complain of many of the instructions given at the request of plaintiffs. The arguments in the briefs are extensive. The jury was fully instructed. If there were errors in any of the instructions, they did not go so far as to misstate any of the vital, fundamental principles of law by which the jury was to be guided in arriving at its verdict.

[7] Only one of the instructions given requires discussion. The jury was instructed that it was unlawful for a vehicle to be driven at a greater speed than twenty-five miles per hour in a business district or at a greater speed than fifteen miles per hour across an obstructed intersection, both speeds being applicable to the place of the accident. This instruction, in our opinion, should not have been given. If the jury was to be instructed in the matter of speed, the full purport of the statute should have been stated. In criminal cases, speeds in excess of those prescribed by the California Vehicle Act are, by the terms of the act (section 113 (c), St.1923, p. 553, as amended by St. 1931, p. 1436), prima facie, but not conclusively, unlawful. Nor are the speeds prescribed lawful under all circumstances. While the instruction very properly did not declare that higher speeds were, in themselves, evidence of negligence, it might well be questioned whether the jury was certain in distinguishing between that speed which, by the court, was declared to be unlawful and that which was negligent. As the jury had been properly instructed that one operating a motor vehicle has a right to assume that others using the highways will observe the law, the instruction in question would have been understood, as though it had so specifically stated, that each driver had a right to assume that others driving in that district would not travel faster than twenty-five miles per hour and would not traverse the intersection in question faster than fifteen miles per hour. But in the same connection the jury was also instructed that one has no right to act upon such assumption after he has knowledge, or by the use of reasonable diligence should know, that the law is not being observed. There was no evidence that either driver acted upon this assumption, nor can such an inference reasonably be drawn. Upon the contrary, each was aware, or believed, when he first viewed the other car, that a greater speed than twenty-five miles per hour was being maintained. Neither from the testimony nor from the actions of the drivers can it be said that either believed, or had reason to believe, that the other was about to, or would, retard his speed before reaching the intersection. The matter of reliance upon the assumption that the other driver would slow down, important as it may be in cases where such reliance is proven or properly to be inferred, as applied to the facts of this case, is purely an abstract principle of law, which manifestly did not influence the conduct of either operator. We are of the opinion that the giving of this erroneous instruction did not mislead the jury in its consideration of the facts of the case, and we cannot say that a different verdict would probably have been reached had the instruction not been given. We are unable to say that any other instruction, of which appellants complain, led to an unjust or erroneous verdict against any or either of the defendants. We have stated the substance of the evidence in the case quite fully, because we are of the opinion that the negligence of each driver was firmly established. Each testified that his own speed was around fifteen miles per hour, and that of the other around thirty. If both cars had been traveling slowly there would have been no accident, or, at most, a minor one. The physical evidence of a collision of great violence, the fact that each car proceeded up to the point of impact with little or no diminution of speed, and the fact that nothing approaching adequate care was exercised by either driver to observe traffic approaching the intersection, all point strongly toward the conclusion that each driver proceeded into the intersection at a rate of speed, and with a degree of inattention to his surroundings that, under the circumstances, was nothing short of reckless.

[8] "For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must affirmatively be of the opinion that there has been a miscarriage of justice." Haney v. Takakura, supra. Applying this

rule to the present case, we must affirm the judgment.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



11 Cal.App.2d 274

EL CLARO OIL & GAS CO. v. DAUGHERTY, Com'r of Corporations.*

Civ. 9994.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1936.

Rehearing Denied Feb. 15, 1936.

Hearing Denied by Supreme Court March 16, 1936.

1. Licenses ⇐18½

Assignment of, and agreement to assign, a portion of major oil lease, but not conveying or agreeing to convey any interest in oil to be saved by assignor's operations, *held* not "securities" within Corporate Securities Act prohibiting sale without permit (Gen. Laws 1931, Act 3814, § 2 (a), par. 7).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Licenses ⇐18½

Assignment of, and agreement to assign, portion of major oil lease when issued together with agreement providing for consolidation of rights into community interest, providing for drilling of well and division of oil and gas produced constituted "securities" and transfer thereof constitute "sale" within Corporate Securities Act prohibiting sale without permit (Gen.Laws 1931, Act 3814, § 2 (a), par. 7).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

3. Contracts ⇐164

Documents relating to same matters between same parties and executed as parts of substantially one transaction are to be construed together.

4. Licenses ⇐18½

In determining existence of violation of statute prohibiting sale of securities without permit, good faith of party making sale is immaterial (Gen.Laws 1931, Act 3814, § 2 (a), par. 7).

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Suit by the El Claro Oil & Gas Company against Edwin M. Daugherty, as Commissioner of Corporations of the State of California. From an adverse judgment, defendant appeals.

Judgment reversed with instructions.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for appellant.

Arthur C. Fisher, of Los Angeles, for respondent.

STURTEVANT, Justice.

The defendant has appealed from a judgment in favor of the plaintiff and against the defendant, enjoining the latter from interfering with the sale of certain oil and gas contracts.

Some time prior to the year 1932, William L. Brewer and his associates became interested in the development of oil wells in Glenn county. They obtained numerous leases. Thereafter they caused the plaintiff corporation to be organized. To that corporation they assigned their leases and in consideration thereof certain shares of stock were issued to the promoters. No suggestion of any irregularity is made regarding any step down to this stage of the proceedings. Continuing the story, the stipulated facts, or facts found by the court, are as follows: After the plaintiff corporation was organized as above stated, it had become the lessee of several tracts of land. Each tract of land was mapped or platted into lots 82½ by 132 feet, that is, each quarter section was divided into 640 lots each containing one-fourth of one acre. Except as herein expressly mentioned the record contains no suggestion of fraud. However, the parties differ as to the proper construction to be given to certain written instruments.

Before commencing the sale of the documents involved in this litigation the plaintiff caused to be formed Tehama Petroleum Corporation. That corporation has the same officers, the same stockholders, and each stockholder holds the same amount of stock in the latter company as in the former. It has its office in the same rooms, and, generally speaking, has the same agents and employees as the plaintiff.

Having prepared an organization as shown above, the plaintiff commenced the sales which are the subject-matter of this suit and which the defendant commissioner claimed to be in violation of the Corpo-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 55 P.(2d) 488.

rate Securities Act. 2 Deering's Gen. Laws 1931, p. 1924, Act 3814. The thing sold and the manner of sale was as follows: The plaintiff sent forth agents directing them to sell, and they did sell and were continuing to sell to various persons, one contract and only one contract to each assignee. Said contracts, Exhibit 1, were as follows:

"El Claro Oil & Gas Company
"Los Angeles, Calif.

"Assignment and Agreement

"The undersigned hereby sells, assigns and transfers to ——— heirs, successors and assigns, all of the assignor's right, title and interest in and to that certain oil and gas lease made and executed by J. K. and Phoebe Merry Masterson under date of April 28, 1932, to the El Claro Oil and Gas Company and recorded on the 12th day of May, 1932, in the office of the County Recorder of Glenn County, California, only in so far as said lease applies to and affects the following parcel of land therein contained, also that certain oil and gas lease made and executed by F. P. and Florence Masterson under date of April 30, 1932, to the El Claro Oil and Gas Company and recorded on the ——— day of May, 1932, in the office of the County Recorder of Glenn County, California, only in so far as said lease applies to and affects the following parcel of land therein contained:

"Description: This assignment is made upon condition that the Assignee takes the same subject to all of the terms, conditions and covenants of the aforementioned lease to the same extent and in the same manner as if the provisions of said lease were fully set out herein.

"In witness whereof, we have hereunto set our hands and seals this ——— day of ———, 1932.

"El Claro Oil and Gas Company
"By ——— Secretary
"——— President

"Attest:
"———"

When the purchaser desired the plaintiff to do so the agents were authorized to sell Exhibit 2, an agreement to assign, which was of the same purport as the above instrument except on its face it was an agreement to assign instead of an outright assignment. Having made a sale, the said agents were authorized, and they did attempt to have the assignee execute Exhibit 3, in favor of the Tehama Petroleum Corporation. Such other assignment was as follows:

"Assignment and Agreement

"This agreement, made and entered into this ——— day of ———, 1932, by and between ———, hereinafter called Assignor, whether one or more, and Tehama Petroleum Corporation, hereinafter called Assignee, agrees as follows:

"Whereas, on the 28th day of April, 1932, a certain oil and gas lease was made and executed by J. K. and Phoebe Merry Masterson to El Claro Oil and Gas Company which lease was subsequently recorded on the 12th day of May, 1932, in the office of the County Recorder of Glenn County, California, and

"Whereas, on the 30th day of April, 1932, a certain oil and gas lease was made and executed by F. P. and Florence Masterson to El Claro Oil and Gas Company which lease was subsequently recorded on the ——— day of May, 1932, in the office of the County Recorder of Glenn County, California, and which leases included, among other lands, the following described six hundred and forty acres:

"Description: N. ½ Sec. 4, Twp. 22 N., R. 5 W., and E. ½ of Sec. 9, Twp. 22 N., R. 5 W., and

"Whereas, subsequent to the execution of said lease there was assigned out of the same to the Assignor herein the following described parcel:

"Description: ——— and ———

"Whereas, the Assignor is desirous of subletting the same to the Assignee in what is commonly known as a community lease;

"In consideration of the foregoing, the Assignor hereby assigns to the Assignee all of his right, title and interest in and to the last above mentioned parcel contained in the aforementioned lease subject to all of the terms, conditions and covenants of said lease and of the prior assignments thereof.

"It is mutually understood and agreed that while the parcel last above mentioned and other parcels comprising the six hundred and forty acres, more or less, first above mentioned are now or may be hereafter owned in severalty or in separate parcels or separate tracts, the said six hundred and forty acres shall nevertheless be developed and operated as one lease.

"That all oil and gas produced upon said 640 acres by Assignee shall be divided as follows:

"(1) 12½% to landowner;

"(2) 22½% to Assignee;

"(3) 65% to separate Assignors of the parcels of said 640 acres in proportion that the number of square footage of said land assigned by each separate owner bears to the entire 640 acres herein described.

"That the assignee and separate assignors herein are to bear production and marketing costs of entire production in proportion that the interest of each bears to the entire 640 acres, provided, however, that cost to said assignors shall not exceed $1.00 per well per each one-quarter acre per month.

"That as an additional consideration for the making of this assignment, the Assignee herein described shall expend or cause to be expended for the drilling of a well or wells on the aforementioned six hundred and forty acres the sum of Twenty-five Dollars ($25.00). Unless oil or gas is produced in commercial quantities prior to the expenditure thereof, or unless a depth of 4,000 feet is attained prior to the expenditure thereof.

"That when and if oil or gas is produced in commercial quantities on the lands above described, the Assignee herein shall pay to the separate Assignors of said described lands, sixty-five per cent (65%) of the returns received by the Assignee from the production and sale of said oil, gas and other hydrocarbon substances, the Assignors herein each receiving his proportionate share thereof on the basis heretofore set forth herein.

"That upon obtaining production, a Bank in the State of California will be designated as a depository agent to receive and disburse to the respective parties entitled thereto, the aforementioned monies derived from the sale of oil, gas, and other hydrocarbon substances and the Assignee herein described shall pay to such depository and agent for and on behalf of all Assignors of any parcels in said six hundred and forty acres all monies to be paid as heretofore set forth.

"That such depository or agent, upon receipt of said monies shall promptly distribute the same to the various Assignors of parcels in said six hundred and forty acres in the proportion that the number of square footage of land assigned by each separate Assignor bears to the entire tract of six hundred and forty acres.

"It is further mutually understood and agreed that when and if oil or gas is produced in commercial quantities in any well on the aforedescribed six hundred and forty acres that the Assignee herein shall utilize seventy-five per cent (75%) of the net returns from the production thereof, and from subsequent production, for the purpose of drilling additional wells on said six hundred forty acres only until the full number of wells provided for in the lease first herein mentioned shall have been completed. And the Assignor hereby authorizes the Assignee to withhold seventy-five per cent (75%) of the money due to the Assignor as aforesaid and to use the same for the drilling of said wells. Net returns shall mean the amount remaining after deducting landowners royalty of 12½% (⅛ of gross production), together with cost of production and marketing which is not to exceed $1.00 per month, per well for each one-quarter acre lease.

"In witness whereof the parties have hereunto set their hands the day and year first above written.

"_____ Assignor

"Address _____

"Tehama Petroleum Corporation

"Assignee

"By _____"

The assignees accepted either Exhibit 1 or 2. No assignee was compelled or required to execute Exhibit 3, but 90 per cent. did so. Upwards of one thousand sales were so made.

[1] From the facts which we have recited, it seems to be clear that for all of the purposes of this litigation El Claro Oil & Gas Company and Tehama Petroleum Corporation were one and the same entity operating under different names. Any question on that subject is foreclosed by the stipulation entered into at the time of the trial. Counsel for the plaintiff stipulated, "* * * that for the purpose of this action the document that is set forth in defendant's answer as Exhibit (c) (which is hereinabove set forth as Exhibit 3) may be considered as being the agreement signed by the plaintiff in this action." The findings adopt and incorporate that stipulation. In the trial court the defendant claimed, and in the briefs filed in this court he claims, that all of the documents so issued as aforesaid were illegally issued.

That claim is, we think, too broad. All of said sales do not rest on the same facts. The record presents three different propositions. The first is concerned with the issuance solely of Exhibit 1. It was a transfer of a portion of the major lease. It conveyed no interest in any oil to be saved by the operations of the assignor. Therefore it was not a security within the meaning of paragraph 7, subdivision (a), section 2 of the Corporate Securities Act. The court so found, and we think it did not err. People v. Steele, 2 Cal.App.(2d) 370, 36 P.(2d) 40; Domestic, etc., Petroleum Co. v. Long et al. (Cal.Sup.) 51 P.(2d) 73.

The second proposition is concerned with the issuance solely of Exhibit 2. Except that it was an agreement to assign, instead of an outright assignment, the same remarks can be made as applicable to Exhibit 2. As to Exhibit 2, the findings are also supported by the evidence.

[2-4] The third proposition presents a combination of facts that is quite different. In 90 per cent. of the sales a document was issued in the form of Exhibit 1 or in the form of Exhibit 2 and, as a part of the same transaction, another document was executed in the form of Exhibit 3. In those instances it is quite clear that the plaintiff parted with, or agreed to part with, certain parts and portions of the petroleum products thereafter to be saved by its operations. Exhibits 1 and 3, when issued together, as above stated, were a "security" and the transfer was a "sale" as clearly defined by the statutory provisions cited above. If and when such issues were made as part of the same transaction, without first obtaining a permit from the defendant, then it is equally clear that such sale was illegal. People v. Craven, 219 Cal. 522, 27 P.(2d) 906; Domestic, etc., Petroleum Co. v. Long et al. (Cal. Sup.) 51 P.(2d) 73. Counsel pick up Exhibit 1 and argue that it did not come within the provisions of the statute. Similarly they pick out certain words and make the same contention. They also pick up Exhibit 3 and claim it was but a consolidation of rights into a community interest. In so presenting the subject-matter they fail to give force and effect to a fundamental rule governing the interpretation of written instruments. As the execution of either Exhibit 1 or Exhibit 2 was, at times, but a part of the transaction, the rest of which was the execution of Exhibit 3, both should be read together. As the two documents, Exhibit 1 (or Exhibit 2), and Exhibit 3 related to the same matters between the same parties and were made as parts of substantially one transaction, they are to be taken together. Civ.Code, § 1642. As so read, they clearly fall within the doctrine of People v. Craven, supra. Framing the contract in two papers did not change its legal effect. It is settled law that an act which may not legally be done directly may not legally be done indirectly. Both during the trial and in the briefs presented there are many assertions to the effect that the plaintiff and its agents acted in good faith. However, good faith is not an element mentioned in the statute. It prohibits the doing of certain acts without first obtaining from the defendant a permit authorizing those acts. As it does not mention good or bad faith such factors are not involved. People v. McCalla, 63 Cal.App. 783, 793, 220 P. 436. Again it is claimed that the defendant was engaged in organizing operations to sink oil wells as under a community lease. It is further asserted that it is settled law that oil wells may be lawfully developed under a community lease. Both propositions will be freely conceded, but it does not follow that one may, in one transaction, create interests in severalty and then combine the same under an alleged community lease without complying with the provisions of the Corporate Securities Act.

The questions before the trial court were nearly all questions of law, but some were questions of fact. The findings of fact were not at all times kept separate from the conclusions of law. However, the defendant in his brief consistently attacks both findings of fact and conclusions of law which are at variance with what has been said above. We are not aware of any finding of fact that was based on a conflict in the evidence. All of the allegations alleged in the defendant's answer regarding Exhibit 3, when issued as part of the same transaction in connection with Exhibit 1, or Exhibit 2, were sustained. But in an endeavor to prevent anything in the nature of an admission there are purported findings of fact (which in reality are but conclusions of law) to the effect that the plaintiff did not "sell" Exhibit 1 and Exhibit 3 together and as part of the same transaction and that said two documents, taken together, were not a "security." There are also findings that said sales were not made to "the public." Whereas

the evidence is all one way and in direct conflict with said findings.

It follows that the judgment should be reversed, that the findings should be reframed in accordance with the views hereinabove expressed, and that a judgment in accordance therewith should be entered. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 479

BERRY v. MAYWOOD MUT. WATER CO.

No. 1.

Civ. 10668.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1936.

Hearing Denied by Supreme Court March 30, 1936.

1. Attorney and client ⇐167(3)

Instruction that, where plaintiff sues for attorney fees for services performed, defendant, interposing defense of special contract, has burden of proving such contract and defendant's proof must be clear and "unequivocal," *held* error.

The word "unequivocal" is defined as capable of being understood in only one way, or as clearly demonstrated, free from uncertainty, or without doubt, and, when used with reference to the burden of proof, it implies proof of the highest possible character and it imports proof of the nature of mathematical certainty.

[Ed. Note.—For other definitions of "Unequivocal," see Words & Phrases.]

2. Attorney and client ⇐166(2)

In attorney's action for fees for services performed, defendant was required to establish special defense of special contract only by preponderance of evidence.

Appeal from Superior Court, Los Angeles County.

Action by Victor A. Berry against the Maywood Mutual Water Company Number One. Judgment for plaintiff, and defendant appeals.

Reversed.

H. W. Shaw, of Los Angeles, for appellant.

Victor A. Berry, of Beverly Hills, in pro. per.

WOOD, Justice.

Plaintiff, an attorney at law, recovered a judgment against defendant following a jury verdict, based upon his complaint for the reasonable value of services rendered. Defendant answered that plaintiff had been fully paid and interposed the defense that plaintiff's services were rendered pursuant to a contract, the terms of which had been complied with by defendant. The evidence was conflicting, that of defendant being ample to support a verdict in its favor if such had been returned.

In its general instructions the trial court instructed the jury: "In civil cases a preponderance of evidence is all that is required, that is, such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." At the request of plaintiff the court instructed the jury as follows: "The court instructs the jury that where a plaintiff sues to recover attorney fees for services already performed, and the defendant corporation interposes the special defense of a special contract with the attorney plaintiff, the burden of proof of said alleged contract is on the defendant, and such defendant's proof must be clear and unequivocal, and if it is not so then the plaintiff is entitled to recover for the reasonable value of his services."

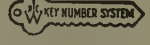
[1, 2] The word "unequivocal" is given the following definition in Standard Dictionary: "Capable of being understood in only one way." In 65 Corpus Juris we find: "The term (unequivocal) is defined to mean, among other things, clearly demonstrated, free from uncertainty, or without doubt. When used with reference to the burden of proof it implies proof of the highest possible character, and imports proof of the nature of mathematical certainty." In Merrick v. Ditzler, 91 Ohio St. 256, 110 N.E. 493, 494, this language is used: "The term 'unequivocal' is defined to mean, among other things, 'without doubt,' 'clearly demonstrated,' 'free from uncertainty.' It implies proof of the highest possible character, equaling, if not exceeding, the proof required of the state in a criminal proceeding. It imports proof

of the nature of mathematical certainty—something that in human affairs is all but impossible to obtain."

By giving the last instruction quoted the trial court placed an undue burden upon defendant. The instruction was clearly erroneous and, under the circumstances shown in evidence, prejudicial to defendant's rights. The only burden upon defendant was to establish the special defense by a mere preponderance of the evidence. Cusick v. Boyne, 1 Cal.App. 643, 82 P. 985.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



WARE v. FRANK MELINE CO., Inc., et al.*

Civ. 5448.

District Court of Appeal, Third District, California.

Jan. 27, 1936.

Rehearing Denied Feb. 26, 1936.

Hearing Granted by Supreme Court March 26, 1936.

1. Vendor and purchaser ⇐109

Purchaser who never had possession or deed *held* entitled to rescind executory land contract because of material failure of consideration, where sea covered land with débris and destroyed shore drive and apparatus for furnishing light, water, and gas (Civ. Code, § 1689 (4).

2. Vendor and purchaser ⇐120

Notice of rescission, if necessary, *held* adequate, where purchaser's attorney wrote to owner's agent giving specific reasons why there was substantial failure of consideration due to inroads of sea, and, in effect, demanding cancellation of executory contract and repayment of installments.

3. Vendor and purchaser ⇐120

Notice is sufficient if it may be understood therefrom that purchaser contends that executory land contract is void for any reason and intends to rescind it; no specific form of notice being required.

4. Principal and agent ⇐178(1)

Owner's duly authorized agent conducting entire transaction and receiving all payments *held* impliedly authorized to accept notice of rescission of executory land contract, obviating necessity of serving further notice on vendor's successor.

5. Vendor and purchaser ⇐116

Purchaser who had neither possession nor title *held* to have received nothing of value to be tendered back as prerequisite to action to rescind executory land contract, and purchaser was entitled to hold such contract in case rescission was denied (Civ.Code, § 1691).

6. Principal and agent ⇐136(4)

Where purchaser, though dealing with agent, promptly received land contract naming principal as vendor, agent *held* not liable in rescission action for return of money paid to agent on contract.

7. Principal and agent ⇐146(3)

Agent contracting to sell land in his own name without disclosing principal is personally liable on contract.

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

Action by James G. Ware against the Frank Meline Company, Incorporated, and another. Judgment for plaintiff, and defendants appeal.

Reversed as to defendant named, and affirmed as to its codefendant.

Coleman E. Stewart, of Santa Barbara, for appellants.

Walter H. Hewicker, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them for the rescission of an executory contract to convey real property on the ground of a failure of consideration resulting from the destruction of a material portion of the property on account of inroads of the sea. The judgment also requires the repayment to plaintiff of the installments which were paid to the defendants on account of the purchase price of the property.

The defendant Security-First National Bank of Los Angeles, a banking corporation, is successor in interest of Pacific-Southwest Trust & Savings Bank, which was the owner of lot 866, block 2, in Ventura county, as per map thereof recorded in Book 15, pages 26 to 31, of the records of said county. The lot borders on the Pacific Ocean. The defendant the Frank

 *For subsequent opinion see 61 P.2d 936.

Meline Company, Inc., is the acknowledged agent of the owner of the lot in question. January 25, 1926, the plaintiff entered into a written contract to purchase the lot from the owner thereof through its agent, the Frank Meline Company, for an initial payment of $79 and monthly payments of $10 to be paid each month thereafter until the full purchase price therefor amounting to the sum of $790 was fully paid, with interest on all deferred payments at the rate of 7 per cent. per annum. Prior to September 11, 1931, the plaintiff paid to said agent the total sum of $955.75, which included the principal installments due, and interest thereon. The lot was unimproved, and the plaintiff never had possession thereof. The contract for purchase of the lot provided that the vendor would make specified improvements thereon and appurtenant thereto, including apparatus for street lighting, water, gas, etc. These improvements were made. No deed to the property passed. In January, 1931, without the knowledge of plaintiff the value of the lot was materially destroyed by encroachment of the sea which washed out the "Shore Drive" intervening between the lot and the sea and utterly destroyed the equipment for lighting, water, and gas appurtenant thereto and by covering the lot with "sand and debris." The court found that the owner of the lot was an "undisclosed principal," but it appears that a formal contract of sale was executed January 25, 1926, and thereafter delivered to the plaintiff, in which instrument the Pacific-Southwest Trust & Savings Bank was named as the vendor. October 15, 1931, the plaintiff discovered the material damage to the lot and the court found that the plaintiff then "notified defendants that he would not accept a deed of conveyance to the real property." In May, 1932, the attorney for the plaintiff notified the agent of the defendant bank in writing that the value of the lot in question had been materially destroyed by encroachment of the sea as above related, and that the plaintiff "demands of your company at this time repayment of all moneys paid to you on account of the contract in question." Payment was refused by the defendants, and this suit was instituted. The cause was tried by the court which adopted findings favorable to the plaintiff on all essential issues. A judgment was thereupon rendered rescinding the contract of purchase of the lot on the ground of a material loss of the value thereof by encroachment of the sea and awarding plaintiff the sum of $955.75 and costs of suit. From this judgment the defendants have appealed.

It is contended the agent of the vendor of the lot in question is not liable on rescission for repayment of the money received on account of the purchase price thereof; that damage to the lot by encroachment of the sea, over which the defendants had no control, does not furnish ground for rescission, and that the owner of the lot was not given notice of rescission which is a necessary prerequisite to the maintenance of this suit.

[1] Under the circumstances of this case, the plaintiff was entitled to rescind the contract to purchase the lot in question on the ground of a material failure of consideration. The contract was executory. The conditions thereof were not fulfilled. The plaintiff never had possession of the property. The deed had not passed. Pending the contract, the value of the land was materially impaired by inroads of the sea which destroyed the apparatus for furnishing light, water, and gas to the premises and by covering the lot with sand and débris and by washing out the "Shore Drive" adjacent to the land, thus causing a material failure of consideration and rendering it impossible for the vendors to specifically perform the terms of the contract. Under such circumstances, the purchaser of real property under an executory contract is entitled to rescind the instrument and recover the money paid on the purchase price thereof. Section 1689, Civ.Code; Conlin v. Osborn, 161 Cal. 659, 120 P. 755; Ogren v. Inner Harbor Land Company, 83 Cal. App. 197, 256 P. 607; Higbie v. Shields, 27 Cal.App. 536, 150 P. 801; 4 Cal.Jur. 785, § 20; 25 Cal.Jur. 718, § 189. Section 1689 of the Civil Code provides in part:

"A party to a contract may rescind the same in the following cases only: * * *

"(4) If such consideration, before it is rendered to him, fails in a material respect, from any cause."

[2] Assuming, without so deciding, that it is necessary under the circumstances of this case for the purchaser of real property under an executory contract to give the owner formal notice of rescission as a prerequisite to the maintenance of a suit to cancel the contract, we are of the opinion the notice which was given in this case is adequate. The plaintiff's attorney wrote to the acknowledged agent of the owner of the lot giving specific reasons why he con-

sidered the material damages which resulted to the property on account of the inroads of the sea a substantial failure of consideration, and, in effect, demanding a cancellation of the contract and repayment of the money advanced thereon, and upon failure to do so he threatened to institute proceedings for that purpose. The letter contains the following language: "Dr. James G. Ware demands of your company at this time repayment of all moneys paid to you on account of the contract in question."

[3] No specific form of notice of rescission is required. It is sufficient if it may be understood from the notice which is given that the purchaser of land under an executory contract contends that it is void for any reason and that he intends to rescind it. 2 Black on Rescission and Cancellation, p. 1346, § 573. In the case of Guscetti v. Dugan, 60 Cal.App. 187, 212 P. 397, 399, it is said in that regard: "No specific form of notice of an intention to rescind is required, and we apprehend that the rights of the defendants were fully satisfied by any notice which would convey to them, within a reasonable time, the idea that the plaintiff wished to cancel the deed and recover the property."

[4] It was not necessary to also serve written notice of rescission on the Security-First National Bank before commencing the action. Notice to its duly authorized agent, under the circumstances of this case, is adequate notice to the principal. The entire transaction for sale of the lot in this case was conducted by the Frank Meline Company, Inc. It is not disputed that it was the duly authorized agent of the owner of the lot in that transaction. A contract for the sale of the lot disclosed the name of the principal, but the plaintiff dealt with the agent only in this transaction, and all payments were made to it. Regarding the service of notice upon an agent, it is said in 20 Ruling Case Law, page 356, § 20: "It seems that where notice is actually conveyed to the person to be notified, as by service on a duly accredited agent, this is sufficient."

Under the circumstances of this case there was an implied authority conferred on the duly authorized agent of the owner of the lot to accept notice of rescission of the contract.

[5] The plaintiff received from the defendants nothing of value which he was required under the provisions of section 1691 of the Civil Code to tender back to them as a prerequisite to the maintenance of this action for rescission. The contract was executory. The plaintiff had neither possession nor title to the land. He received nothing of value to be restored. Larkin v. Mullen, 128 Cal. 449, 60 P. 1091; Shaffer v. Security Trust & Savings Bank, 4 Cal. App.(2d) 707, 713, 41 P.(2d) 948; 2 Black on Rescission and Cancellation, p. 1431, § 621. It was not necessary for the plaintiff to return to the defendants the executory contract in question. The defendants could not be injured by plaintiff retaining the contract in question, and, moreover, he was entitled to hold that instrument in the event that rescission should be denied. Shaffer v. Security Trust & Savings Bank, 4 Cal. App.(2d) 707, 715, 41 P.(2d) 948; 2 Black on Rescission and Cancellation, p. 1431, § 621. The text of the authority last mentioned reads in this regard: "One seeking the rescission of a contract or other transaction is not required to make a tender or offer of restoration of that which he would be entitled in any event to retain, that is, either by virtue of an original liability of the other party if the contract should be rescinded, or under the contract itself if rescission should be refused."

[6, 7] The findings that the plaintiff contracted to purchase the lot in question from the Frank Meline Company, Inc., as agent for the undisclosed principal, is not supported by the evidence. The agent is therefore not liable in this suit for rescission for the return of the money paid on the purchase price thereof. It is a well-established rule of law that an agent who contracts to sell real property in his own name without disclosing the name of his principal is personally liable for breach of the terms thereof. Murphy v. Helmrich, 66 Cal. 69, 4 P. 958; Coover v. Cox, 95 Cal.App. 1, 272 P. 343; Clark v. Baen, 75 Cal.App. 389, 242 P. 872; 1 Cal.Jur. 860, § 136; 1 Mechem on Agency (2d Ed.) p. 1039, § 1410. In the authority last cited it is said: "An agent who conceals the fact of his agency and contracts as the ostensible principal is liable in the same manner and to the same extent as though he were the real principal in interest."

In the present case, however, the evidence is undisputed that the Frank Meline Company, Inc., signed a preliminary instrument on January 25, 1926, termed a receipt, specifically referring to the contract of sale "thereafter to be issued." On that same

date the formal contract for sale of the property was executed by and in the name of the principal as the seller thereof. This was admitted by the plaintiff. He concedes that this contract was delivered to him "a little bit later." There is nothing in the record to support the contention that the plaintiff did not know from the very outset of the transaction who the real owner of the lot was. In the case of Marks v. Jos. H. Rucker & Co., 53 Cal.App. 568, 200 P. 655, 656, it is said in that regard: "To relieve the agent of liability, it is sufficient that the other contracting party have actual knowledge of the identity of the principal; it is immaterial how such knowledge was acquired."

The judgment is reversed as to the defendant the Frank Meline Company, Inc., and it is entitled to its costs on appeal.

The judgment is affirmed as to the defendant Security-First National Bank of Los Angeles, a national banking corporation.

We concur: PULLEN, P. J.; PLUMMER, J.

11 Cal.App.2d 419

DUNPHY et al. v. GUARANTY BUILDING & LOAN ASS'N et al. (GUARANTY LIQUIDATING CORPORATION, Intervener).

Civ. 10009.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1936.

1. Appeal and error ⇐882(3)

Where all parties in trial court treated pleadings as placing in issue all of plaintiffs' allegations and plaintiffs introduced evidence in accordance with theory that issues were made, plaintiffs could not on appeal claim that no issue of fact was made under the answers.

2. Appeal and error ⇐173(2)

In mortgagors' action to quiet title and recover damages resulting from mortgage foreclosure, mortgagors on appeal could not contend that purchaser who bought realty after mortgagee had purchased upon foreclosure, and who intervened in action, did not by not answering mortgagors' allegations of fraud admit cause of action for fraud where such point was not raised in trial court.

3. Pleading ⇐36(3)

In mortgagors' action to quiet title and recover damages resulting from foreclosure, purchaser who bought realty after mortgagee had purchased upon foreclosure and intervened in action did not by not answering mortgagors' allegations of fraud admit cause of action for fraud, since issues of plaintiffs' complaint were made by intervener's predecessors, and intervener was in no way party to alleged fraud.

4. Fraud ⇐34

Mortgagors could not maintain action for fraud based upon mortgage transaction where mortgagors did not rescind transaction whereby they purchased realty, assuming encumbrances, and at time they filed action against mortgagee which had foreclosed trust deed mortgagors were in default.

5. Appeal and error ⇐901

Court of review will never of its own motion search record for purpose of endeavoring to find facts on which to predicate reversal.

6. Appeal and error ⇐671(1)

Court of Appeal would not consider whether defendants violated order made by federal court, where plaintiffs did not quote record nor cite pages thereof which presented point.

7. Appeal and error ⇐1047(3)

In mortgagors' suit to quiet title and for damages for fraud in the mortgage transaction, striking of all evidence concerning property in suit prior to date mortgagors purchased property, even if error, was not prejudicial, where mortgagors were, under the facts, precluded from recovery notwithstanding other evidence.

8. Mortgages ⇐379

In suit to quiet title and for damages for fraud against mortgagee and trustee under trust deed, purchaser from mortgagee which had purchased at foreclosure sale *held* entitled to intervene and obtain judgment quieting title in purchaser (Code Civ.Proc. § 380).

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by Ethel R. Dunphy and husband against the Guaranty Building & Loan Association and others, wherein the Guaranty Liquidating Corporation intervened. From a judgment for the intervener, plaintiffs appeal.

Affirmed.

John C. Kleber, of Los Angeles, and H. M. Dunphy, for appellants.

George W. Fenimore and Donn Bent, both of Los Angeles, for respondents.

STURTEVANT, Justice.

In an action brought to quiet title and to recover damages the trial court granted a motion for a nonsuit against the plaintiffs and made findings in favor of Guaranty Liquidating Corporation, the intervener, quieting its title. From the judgment entered the plaintiffs have appealed.

Heretofore one Fields sold and conveyed to Oscar L. Bishop certain acreage in Los Angeles county which was platted and subdivided as Tract 3874. Among others it contained lot 9. After acquiring title the grantee mortgaged lot 9 to one Lehmann for $4,000. On July 21, 1923, Bishop conveyed to Helen Barnard. She conveyed to C. F. and M. D. Higgins. The latter conveyed to these plaintiffs on January 4, 1928. Helen Barnard purchased the lot for $8,500 (sic). She paid $1,000 down. She assumed the mortgage for $4,000. She made a second mortgage in the sum of $3,750. She agreed to pay and did pay $100 per month for about two years when she sold to Mr. and Mrs. Higgins. The latter paid $1,000 down and executed a trust deed for $7,750 to secure a loan from Guaranty Building & Loan Association, which, in turn, paid off the two encumbrances, one for $4,000 and one for $3,750. In 1928 the plaintiffs bought the lot from Mr. and Mrs. Higgins. They paid $700 down and assumed the encumbrance. They executed another note and trust deed and the first one was canceled. The debt so evidenced was made payable $75 per month. After taking title they made their payments until October, 1930, when they ceased and since then they have made none. The trust deed hereinabove last mentioned was made to North American Bond & Mortgage Company as trustee to secure the note in favor of Guaranty Building & Loan Association.

On December 23, 1930, A. N. Kemp was appointed receiver of Guaranty Building & Loan Association. After he qualified as such receiver the note and trust deed constituting the evidence of the encumbrance on the property came into his possession. He caused the obligation to be foreclosed. At the sale he bid in the property for $3,500 and received a deed therefor. Later he conveyed it to Guaranty Liquidating Corporation.

On April 20, 1931, this action was commenced. The plaintiffs named as defendants Guaranty Building & Loan Association, the beneficiary under the deed of trust, North American Bond & Mortgage Company, the trustee, and A. N. Kemp, the said receiver. All defendants answered and put in issue all of the material allegations of plaintiffs' complaint. Still later Guaranty Liquidating Corporation intervened. In its complaint it set forth a cause of action in the ordinary form asking that its title be quieted and that it be put in possession of said property The plaintiffs answered the complaint in intervention and on all of the issues so made the action went to trial.

The hearing arose on the case as made by the complaint of the plaintiffs and the answers thereto. That complaint contained three counts. The first pleaded a cause of action to quiet title. The second purported to plead a cause of action for damages for alleged fraud. The third pleaded a cause of action for moneys had and received. At the end of the plaintiffs' case the court granted a motion of the defendants for a nonsuit.

[1] The plaintiffs claim no issue of fact was made under the answers. No such question was presented to the trial court. All of the parties treated the pleadings as placing in issue all of plaintiffs' allegations and the plaintiffs introduced their evidence in accordance with the theory that the denials were sufficient.

[2, 3] It is also claimed the intervener, by failing to interpose an answer, admitted plaintiffs' second cause of action. The point is without merit for several reasons. The point was not presented to the trial court. As to the plaintiffs' complaint the issues were made by the predecessors in interest of the intervener. It accepted and acted on the issues made by the plaintiffs' complaint as the record stood when it was allowed to intervene. Finally, under no theory was it a party to the alleged fraud nor responsible therefor.

It is next asserted that the note which plaintiffs made had no consideration. It is sufficient to state that the facts hereinabove set forth negative that assertion. It should also be stated that there was not a particle of evidence to the effect that the note had no consideration. The property

may not have had the value which Mr. Beesemeyer, the managing agent of Guaranty Building & Loan Association, placed on it; but according to the uncontradicted evidence it had a value in excess of the cash payment made by the plaintiffs.

[4] The plaintiffs assert that the transaction was the result of defendants' fraud. Be that as it may, the plaintiffs did not present sufficient evidence to authorize a judgment in their favor for damages. They did not rescind. Neither did they live up to the terms of their contract. At the time they filed their action they were in default for many instalments due and payable by the terms of the contract. Under these circumstances they were not entitled to sue for damages. 12 Cal.Jur. 782; Hines v. Brode, 168 Cal. 507, 515, 143 P. 729.

[5, 6] It is next asserted that these defendants violated an order made by a federal court. The plaintiffs do not quote any part of the record nor cite any pages thereof which present the point. A court of review will never, of its own motion, search a record for the purpose of endeavoring to find facts on which to predicate a reversal.

[7] Immediately before the trial court granted the motion for a nonsuit it granted a motion of the defendants striking out all of the evidence which concerned the property in suit prior to January 4, 1928, the date on which the plaintiffs secured their title. Taken in connection with the issues made by the pleadings, plaintiffs claim the evidence would have supported their right to recover under their second count. But, as there was no evidence that the plaintiffs performed those acts which under the contract they were bound to perform, as we have shown above, they were not entitled to recover damages as for fraud. If the motion to strike had not been granted, nevertheless the plaintiffs were not entitled under the facts to recover. It follows that, if we assume the granting of the motion was an error, such error was not prejudicial.

[8] The last contention made by the plaintiffs is that the issue presented by the complaint in intervention is impossible. On the contrary, we think it was quite possible and proper. Under the issues made by the plaintiffs' complaint and the answers thereto, the court had no power to give affirmative relief to anyone except the plaintiffs. Under the facts, the title rested in the intervener. We see no reason why it should not have had an opportunity to appear, file the pleading it did, and obtain an affirmative judgment quieting its title. Code Civ.Proc. § 380; Kitts v. Austin, 83 Cal. 167, 23 P. 290.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 357

RASMUSSEN v. FRESNO TRACTION CO. et al.

Civ. 1745.

District Court of Appeal, Fourth District, California.

Jan. 21, 1936.

Appeal and error ⇐801(5), 1127

Motion to dismiss appeal or affirm judgment was denied where it appeared after examination of opening brief and papers filed in support of motion that points raised on appeal could not be decided without examination of entire record.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by H. B. Rasmussen against the Fresno Traction Company and another. From the judgment, defendants appeal. On motion to dismiss defendants' appeal.

Motion denied.

W. H. Stammer, of Fresno, for appellants.

David E. Peckinpah and Harold M. Child, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal or affirm the judgment.

We have frequently held that such a motion should not be granted where it appears, after examination of the opening brief and the papers filed in support of the

motion, that the case cannot be decided without examining the entire record. Brown v. Gow, 126 Cal.App. 113, 14 P.(2d) 322; Ross v. Mahoney, 134 Cal.App. 199, 25 P.(2d) 268; Barr v. Hall (Cal.App.) 49 P.(2d) 1124.

At least two of the points raised on this appeal could not be decided without a complete examination of the entire record. This is virtually conceded by the respondent, whose notice of motion states that the same would be based upon the entire record on this appeal and also upon the entire record in a prior appeal. Moreover, in his argument in support of this motion he goes outside of the opening brief and the moving papers and presents matters which require a study of the entire record.

An examination of the opening brief and the moving papers indicates that the questions here raised call for careful consideration and will require a thorough examination of the evidence, in all of which the court is entitled to the assistance of the respondent.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 442

SCHWARTZLER v. LEMAS et al. (VIERRA et al., Interveners).

Civ. 5388.

District Court of Appeal, Third District, California.

Jan. 27, 1936.

1. Trial ⇐396(4)

In foreclosure action, findings that mortgagor did not agree with third person to sell half interest in certain property, including some of subsequently mortgaged chattels, and that plaintiff mortgagee had no knowledge of third person's interest, *held* contrary to uncontradicted testimony.

2. Chattel mortgages ⇐92, 152

That mortgage was not recorded for almost five months did not invalidate mortgage as against mortgagors or other persons, including prospective buyer under mortgagor's antecedent agreement to sell half interest in some of mortgaged chattels.

3. Chattel mortgages ⇐152

Chattel mortgage, though not promptly recorded, cannot be attacked by third person unless he acquired rights or became creditor of mortgagor during interval between execution and recordation.

4. Appeal and error ⇐1011(1)

Finding of court on conflicting testimony in trial without jury *held* binding on appeal.

5. Chattel mortgages ⇐225(1)

Felony statute punishing sale of mortgaged chattels without mortgagee's written consent *held* not to invalidate sale, nor to affect buyer's title even as against mortgagee (Pen.Code, § 538).

6. Chattel mortgages ⇐225(1)

Felony statute punishing "sale" of mortgaged chattels without mortgagee's consent *held* inapplicable, as regards validity of prospective buyer's title as against mortgagee, where mortgagor merely made agreement to sell, retaining title until full payment of price (Pen.Code, § 538).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

7. Husband and wife ⇐267(4)

Husband has control of community property and may mortgage without wife's consent, and hence chattel mortgage was not objectionable merely because affidavit was made only by husband.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by P. J. Schwartzler against M. Lemas and another, wherein defendants set up a counterclaim, and M. C. Vierra and another intervened. From a judgment for plaintiff, defendants and interveners appeal.

Affirmed in part, and reversed in part, and cause remanded.

Hjelm & Hjelm, of Turlock, for appellants Lemas & Vierra.

Samuel V. Cornell, of Modesto, for appellant Dutra.

George L. Klug, of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Action to foreclose chattel mortgage. Plaintiff had judgment of foreclosure, from which judgment the defendants and interveners appealed.

The record shows that on the 11th day of September, 1924, the defendants executed and delivered to the plaintiff a chattel mortgage to secure the payment of two promissory notes, one for the sum of $1,500, due six months after date, and one for the sum of $3,317, due six months after date. Thereafter, and on or about the 1st day of January, 1925, the defendant M. Lemas entered into a certain agreement with the intervener M. C. Vierra, by the terms of which Lemas agreed to sell, and the intervener Vierra agreed to purchase a half interest in certain property described in the agreement for sale and purchase. The complaint of the intervener Vierra alleges that by this agreement M. Lemas sold to Vierra a half interest in the property therein mentioned. This, however, is an error. A reading of the agreement shows that it was only an agreement to sell, title remaining in Lemas until the sums therein specified as the purchase price had been fully paid, after which Lemas would transfer to Vierra a half interest in the property described in the agreement, by good and sufficient bill of sale, transferring an unincumbered half interest.

The mortgage just referred to was never foreclosed. Thereafter and on the 20th day of January, 1928, the defendants Lemas, as mortgagors, executed a certain other promissory note for $3,317, due two years after date, and to secure the same executed a chattel mortgage bearing date the same day. This mortgage was not recorded until June 14, 1928. The mortgage executed on the 11th day of September, 1924, described the property as: Forty Holstein milch cows, branded with a horseshoe and marked with a bit in the top and bottom of the right ear; nine three year old Holstein heifers; seven Holstein heifers, one year old; six Holstein heifers, three to six months old; eight Holstein steer calves, six to seven months old; two Holstein bulls; five work horses; one saddle horse; two wagons; two mowers; one rake; cream separator; one gasoline engine; all dairy utensils and accessories; thirty hogs; also, all increase of said livestock.

The mortgage dated January 20, 1928, described the property as follows: Sixty-five milch cows branded with a horseshoe and marked with a bit in the top and bottom of the right ear of each; thirty-one heifers branded with a horseshoe marked with a bit in the top and bottom of the right ear of each; two Holstein bulls; six work horses; one saddle horse; two wagons; one mower; one rake; one cream separator; one gasoline engine; all dairy utensils and accessories; thirty hogs; and the increase of said livestock.

The agreement to which we have referred described the property as follows: A half interest in forty milch cows; eleven two year old heifers; twelve calves, aged from six months to one year; five young calves; two bulls; six horses; and a half interest in all of the hay and farm tools on the premises. The property in the agreement is described as being on the premises occupied by Lemas near the town of Snelling.

The mortgage of 1924 described the property as situate on the Lewis ranch, near the town of Snelling; likewise, the mortgage of 1928 described the property as situate on the Lewis ranch.

There is testimony in the record to the effect that the property described in the agreement is the same property included in the first chattel mortgage, and an allegation in the complaint in intervention, that the mortgage of 1928 included the description of property included in the mortgage of 1924. The complaint in intervention alleged that the plaintiff had knowledge of the sale of the one-half interest to the intervener of the property described in the agreement. The complaint in intervention alleged, in paragraph VI, that the plaintiff claimed a right, title, interest, and estate in and to the property described in the mortgage dated January 20, 1928, paramount and superior to that of the intervener. The answer of the plaintiff denied paragraph VI in the following form: "Denies each and every, all and singular, the allegations of paragraph VI in said complaint." One of the findings of the court is as follows: "That all of the allegations of paragraphs III, IV, VI, and VII of the complaint in intervention of M. C. Vierra are untrue."

We see no possible means of logically reconciling the pleading and the finding just referred to. The allegation is that the plaintiff claims an interest paramount to the rights of the intervener, and that such claim is not well founded. The denial in the answer is to the effect that the plaintiff does not claim such paramount title, and the finding of the court is that the allegation that the plaintiff claims such paramount title is untrue, which, of course, leaves before us the admission that the plaintiff makes no claim to title paramount

to the interest claimed by the intervener. We call attention to this conflict, not for the purpose of basing the decision thereon, but for the reason that the cause must go back for further hearing, and that this conflict may hereafter be avoided.

[1] Paragraph III of the complaint, as we have stated, alleges the entering into the agreement which we have mentioned. The finding of the court is to the effect that that allegation is untrue. This finding is challenged as being contrary to the uncontradicted evidence.

The record shows, without any contradiction, that on or about the 1st day of January, 1925, an agreement was entered into by M. Lemas as party of the first part, and M. C. Vierra, as party of the second part, by the terms of which, "that first party hereby agrees to sell to said second party, and said second party hereby agrees to purchase of first party, a one-half interest in the dairy business and personal property situate on the premises of first party near the town of Snelling, California, as follows:" (Here follows description which we have heretofore set forth.) Concluding as follows: "The title to said property and all of the increase of said stock shall be and remain in the first party until all of said payments are made" (the amounts, terms, and times of payment being set forth therein). The payments being made, the agreement then continues: "First party hereby agrees to deliver unto said second party a good and sufficient bill of sale to said personal property, conveying a good and unincumbered title thereto."

The record indicates that payments were made as provided for in the agreement, but no bill of sale is shown to have ever been made transferring title to the one-half interest in the property to the intervener Vierra, so that his rights, if any, depend simply upon the agreement for a sale, and not upon the actual sale.

While the court found against the allegations of the execution of the agreement, as we have said, it is directly contrary to the uncontradicted testimony in the record. The court likewise found that the plaintiff in the action had no knowledge of the interest of the intervener Vierra in any of the property covered by the mortgage. This finding is directly in conflict with the uncontradicted testimony given by the plaintiff, as follows:

"Q. Have you ever seen that paper before? Look at it carefully. A. Look at it carefully?

"Mr. Klug: I don't know what that paper is. A. I don't know it; I never seen that paper; I think that is a paper that Lemas, Manuel Vierra—well, I ain't going to say now.

"Mr. Hjelm: Now, continue your answer. A. I ain't going to tell you anything; I got too much to tell."

The plaintiff Schwartzler further testified as follows regarding his knowledge of the sale of the interest of Vierra:

"A. That is a paper a couple of years ago Vierra came up again and he had a big long paper in his hand and he wanted to borrow $600.00 from me and he had a couple of friends of his with him and I says, why, what have you got to get money on; what have you got for security; on my half of the cattle; and I guess that is the paper he had there. I says, I ain't got nothing to do with you.

"Q. Go ahead, is that all? A. That is all.

"Q. He showed you a paper at that time? A. He had a paper.

"Q. Did you look at it? A. No.

"Q. He told you he wanted to give you a half interest in the cattle? A. On his cattle; I says, you ain't got no cattle; where did you get any cattle on the Lemas.

"Q. *He told you that he had cattle on the Lemas place?* A. *Yes, he told me that, but what good is that?*"

The plaintiff Schwartzler had no knowledge of the exact time when he saw said paper or was told that Vierra had a half interest in said cattle. Schwartzler further testified concerning his knowledge of said sale to the intervener Vierra as follows:

"Mr. Hjelm: Q. You remember when Vierra and some other men came to your garage up in Snelling? A. Yes, sir.

"Q. Showed you a big paper, you called it, and Vierra wanted to borrow some money—can you hear me all right? Said he wanted to borrow money and give you security on the cattle on Lemas' place? A. *Yes, sir.*"

Plaintiff Schwartzler further testified:

"Mr. Hjelm: Q. Now, then, I understand that you would have the court under-

stand that in 1928 when the mortgage was prepared you did not at that time have any knowledge of any interest that Vierra claimed or had in the Lemas cattle? A. I told him he didn't have any, and I didn't know whether he did or not, that is his say, I heard he had, nobody told me.

"Q. Well, did he tell Vierra that he had no interest in the Lemas cattle? A. I told him when he had them papers, I don't know whether them papers or what papers it was, at the time I told him.

"Q. When he brought the long paper to you, you told him he had no interest? A. I—yes, I ain't loaning money on my own cattle.

"Q. You say you heard Vierra claim an interest. Who did you hear that from? A. I heard a report around, a good many people talking about it, he was a fool to try to go in with Lemas that way, buy half interest when another man got a mortgage on it; that is all I heard fellows talking around town there; that is where I got it.

"Q. And did you have—after you heard that statement made to you that Vierra was taking an interest did you go to Vierra and ask him what his claim was? A. No."

Plaintiff Schwartzler further testified as follows concerning his knowledge of said sale:

"Q. In 1927 you heard that Vierra claimed an interest, didn't you? A. No, sir, not in '27.

"Q. In '26 did you hear it? A. I don't know when that was, that is guess work, I heard many times.

"Q. You heard many times and you can't now really say?

"The Court: You mean the first time? When you first heard it, that is the question? A. I don't know when it was; I couldn't even say that correctly; I know I had the mortgage quite a while, the first mortgage.

"Mr. Hjelm: Before you heard it? A. Before I heard he had anything to do with it.

"Q. You heard it before the new mortgage was entered? A. I heard it.

"Q. And then you have told the court that you heard about Vierra's claim after the old mortgage was made? A. Yes, sir."

The plaintiff Schwartzler further testified as follows:

"Q. Do you remember in 1926, about a year after the meeting in the bank, Mr. Silva, Mr. Vierra came to you, and Mr. Vierra wanted to borrow $200.00, and offered to you— A. $200.00?

"The Court: Wait until the question is finished.

"Mr. Hjelm: And offered to give you a half interest in the Lemas cattle as security for the loan, and you said to Vierra, in Silva's presence, that Vierra didn't have any interest and he couldn't even move a calf away from the place? A. Yes, sir, I said that; I didn't look at the paper; I don't know what paper he had.

"Q. I didn't refer to the paper, but it is your impression that he had a paper? A. You asked me that this morning and that is what I told him, that he had a paper in his hands.

"Q. In my question I just asked you I didn't refer to a paper, but I referred to the question, you remember that occasion and that conversation and your answer? A. Yes, sir.

"Q. That is true? A. Yes, sir, that is true."

The record further shows that some time after the execution of the second mortgage the plaintiff loaned to the intervener Vierra $500, with which to purchase a like half interest in cattle to replace portions of the herd that had been slaughtered by state authorities in eradicating the "hoof and mouth" disease.

[2, 3] On behalf of all of the appellants it is contended that the second mortgage was void for the reason that a number of weeks intervened between the execution and the recordation thereof. The cases cited, however, do not support the contention. It clearly appears in the cases of Williams v. Belling, 76 Cal.App. 610, 245 P. 455; Wolpert v. Gripton, 213 Cal. 474, 2 P.(2d) 767; Noyes v. Bank of Italy, 206 Cal. 266, 274 P. 68; and United Bank & Trust Co. v. Powers, 89 Cal.App. 690, 265 P. 403, that unless the party contesting the validity of the chattel mortgage appeared with some rights or became a creditor of the mortgagor during the interval between execution and recordation, such party is in no position to complain. This disposes of the complaint in intervention by John P. Dutra.

[4] The defendants Lemas set up a counterclaim, but the testimony upon this question is conflicting and the finding of the court in relation thereto is binding upon us, and need not be considered. The defendants also allege a certain agreement by

which the plaintiff agreed to receive payments in the sum of $50 a month, but the record shows that this agreement was not complied with, and also, we think, fails to show any consideration for such an agreement.

As to the defendants Lemas and the intervener Dutra, we find nothing in the record justifying a reversal of the judgment. As to the intervener Vierra, as we have shown, the uncontradicted testimony shows the execution of the agreement; shows that the intervener, together with Lemas, remained in possession of the property from the date of the execution of the agreement; also, shows knowledge of the interest of the intervener on the part of the plaintiff, and that this knowledge was possessed by the plaintiff prior to the execution of the second mortgage.

[5, 6] On the part of the plaintiff it is contended that under and by virtue of the provisions of section 538 of the Penal Code, a sale by a mortgagor of property covered by a chattel mortgage is void by reason of the fact that sales made thereunder, without written notice and a written consent by the mortgagee constitutes the commission of a felony on the part of the mortgagor. If this section applied to the instant case, it would not affect the title of the intervener Vierra.

In 11 C.J. 624 we find the following: "A statute which makes it criminal in a mortgagor to sell the mortgaged property while the mortgage remains in force and unsatisfied, without the written consent of the mortgagee, but does not punish the purchaser and does not prevent title passing to the purchaser, subject to the mortgage lien when such a sale is made, does not affect the purchaser." The section, however, relied upon by the respondent, we think does not apply, for the simple reason that in the instant case no sale is shown to have been made by Lemas to the intervener; only an agreement of sale under certain conditions.

In the case of Morris v. Persing, 76 Neb. 80, 107 N.W. 218, it is specifically held that an agreement to make a sale of mortgaged property is neither malum in se nor malum prohibitum where the statute provides only that it is an offense to make a sale and make no reference to an agreement to sell in the future.

The record shows, as we have stated, that the interest of the intervener Vierra includes only a portion of the property described in the second mortgage, which may properly be determined upon a retrial of this cause.

[7] The point is further urged by the appellants that the affidavits to the second mortgage were made only by the defendant Lemas. As the husband has control of community property and may mortgage without consent of the wife, this contention is without merit.

For the reasons stated, the judgment of the trial court as to the defendants Lemas and intervener John P. Dutra is affirmed. As to the intervener M. C. Vierra the judgment is reversed, and the cause remanded for further proceedings.

We concur: PULLEN, P. J.; THOMPSON, J.



11 Cal.App.2d 426

PEOPLE v. PODWYS.

Cr. 2786.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1936.

Rehearing Denied Feb. 5, 1936.

1. Kidnapping ⇐5
Robbery ⇐24(1)
Evidence sustained conviction of robbery and of kidnapping for purpose of robbery.

2. Stipulations ⇐11
Where witness who had testified against defendant at former trial repudiated such testimony and sought to vindicate defendant, agreement between counsel for people and counsel for defendant, with court's permission, that portion of former testimony of witness might be read, and stipulation by defendant's counsel that such witness had been impeached, *held* not reversible error.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Henry Anthony Podwys was convicted of robbery and of kidnapping for the purpose of robbery, and he appeals.

Affirmed.

See, also, 44 P.(2d) 377.

John A. Ellis and Henry G. Bodkin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

DORAN, Justice.

Appellant was found guilty by the jury of four counts of robbery and one count of kidnapping for the purpose of robbery. Present counsel were thereafter substituted, who now prosecute this appeal.

At the outset, it should be noted that appellant's brief contains the following: "We submit that, although there is no single incident of error which, of itself would require a reversal, yet if, upon a consideration of the case as a whole, it appears substantial justice was not done the defendant, the case should be reversed."

[1] Appellant's first contention, namely, that the verdict is contrary to the law and the evidence, is unsupported by the record and cannot be sustained.

[2] The witness, Mr. Hobson, a prisoner from San Quentin prison, who testified against appellant at a former trial of appellant, when sworn to testify repudiated his former testimony and sought to vindicate defendant and appellant. The district attorney then cross-examined Mr. Hobson as a hostile witness and read from his former testimony. Before this testimony was read, however, the record reveals as follows:

"Mr. Glover (Dep. Dist. Atty.): Mr. Cuff and I have gone over, as best we could, the testimony, your Honor; and we have agreed on certain portions that I might read at this time to the witness.

"The Court: Very well.

"Mr. Glover: And I understand counsel is going to stipulate that these portions may be read.

"Mr. Cuff (Dep. Pub. Def.): Yes.

"The Court: All right."

During the course of the cross-examination the following colloquy occurred:

"Mr. Cuff: I am willing to stipulate Mr. Hobson is thoroughly impeached; that he is as big a liar as the district attorney wants to make him out.

"The Court: Do you accept the stipulation, Mr. Glover?

"Mr. Glover: Yes, your Honor, we certainly do."

This incident, appellant urges, "justifies us in asking a reversal * * * because the whole transaction invaded the province of the jury"; and, further, "We also submit that the colloquy between counsel, * * * was conduct of counsel prejudicial to defendant." In other words, a reversal is now sought based on the joint misconduct of both the People's counsel and the defendant's counsel.

Approaching this proposition in all seriousness, it must be held that no prejudicial or reversible error was committed either by the court or counsel. Defendant was ably represented at the trial and both counsel should be complimented rather than criticized for refusing to sing the praises of a witness whom all that heard probably agreed was destitute of honor, and was without conscience and remorse. Present counsel, had they represented appellant at the trial, might have been able to find truth in the words and virtue in the character of Mr. Hobson; if so, it is appellant's misfortune that he was not so represented.

The defendant had a fair trial; the verdicts are supported by the evidence, and there are no prejudicial errors revealed in the record.

The judgment and the order by which the motion for new trial was denied are affirmed.

We concur: HOUSER, P. J.; YORK, J.

CALIFORNIA REPORTER

IN VOLUME

54 PACIFIC REPORTER

SECOND SERIES

5 Cal.2d 283

PEOPLE v. SKELLY et al.

Cr. 3865.

Supreme Court of California.

Jan. 31, 1936.

Rehearing Denied Feb. 27, 1936.

1. Embezzlement ⇐44(1)

Evidence that officer having controlling direction of stockbrokerage company rehypothecated securities deposited with company as collateral security for loan and disposed of part of securities *held* to support conviction of grand theft.

2. Embezzlement ⇐44(2)

Evidence that officer of stockbrokerage company sold securities which had been deposited as security for loan by customer without knowledge of transaction by which securities had been obtained so as to be aware of criminal nature of sale *held* insufficient to support conviction of grand theft.

In Bank.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Douglas L. Skelly and R. B. Skelly were convicted of grand theft, and they appeal.

Affirmed as to Douglas L. Skelly and reversed as to R. B. Skelly.

Prior opinion, 40 P.(2d) 304.

Rehearing denied; LANGDON, J., dissenting.

Harold Judson and Thos. P. Cruce, both of Los Angeles, for appellant Douglas L. Skelly.

L. B. Randall and Randall & Bartlett, all of Los Angeles, for appellant R. B. Skelly.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

CURTIS, Justice.

Appellants were found guilty after a trial by court, without a jury, of seventeen counts of grand theft; the total amount of the thefts charged aggregating about $39,000. The two appellants are brothers who, at the time of the alleged offenses, were officers of a corporation known as "Douglas L. Skelly Company, Inc.," which company had been licensed by the corporation department of the state of California to do business as a stockbroker. Douglas L. Skelly owned practically the entire stock of the company, and was undoubtedly the one who had the controlling direction of the company. Robert B. Skelly, his younger brother, owned one share of stock in the company and was a director, the treasurer, and trading manager of the company. This appeal is from the order denying the motion for a new trial and from the judgment of conviction.

[1] The conviction of the appellants is predicated primarily and almost solely, upon the testimony of the complaining witness, Charles T. Davis. This testimony is to the effect that on March 14, 1932, he deposited with the Douglas L. Skelly Company, Inc., hereinafter referred to as the "Skelly Company," securities consisting of stocks and bonds of the value of $190,000. He testified that he had been unable to secure a loan from a bank and that he approached Douglas L. Skelly with the proposition that Skelly Company should procure the loan through their connections with a bank using his securities as collateral security for a loan up to $125,000, and that Douglas L. Skelly accepted the proposal, and through this arrangement he procured immediately from Skelly Company an advance of $65,000. He testified that he gave to Skelly Company three demand notes aggregating $65,000 at 6 per cent. interest. He emphatically declared that it was his understanding that his securities were to be pledged with the Security First National Bank of Los Angeles, and that the amount advanced to him was advanced solely as a loan, and

emphatically denied that in making this arrangement with Skelly Company, through Douglas L. Skelly, he had opened any margin account with said company. In January, 1933, so he testified, he discovered for the first time that his securities had not been deposited with the Security First National Bank, but had been rehypothecated by Skelly Company with Russell Miller & Co., stockbrokers, with whom Skelly Company maintained a correspondent margin account, and that certain securities, covered by the indictment, had been sold by said Russell Miller & Co. without his knowledge or consent by order of Skelly Company, and the proceeds thereof credited to Skelly Company's account with the Russell Miller & Co. It also appears that some of his securities had been sold through another firm, and that the money had never been credited to his account.

It is at once apparent that, if this version of the transaction between the parties be accepted as true, a conviction based thereon must necessarily be upheld. Appellants, however, insist that the testimony of the complaining witness is so inherently improbable as to be wholly unworthy of credence and to amount to an insufficiency of the evidence. Appellants insist that the facts of the transactions, despite Davis's statement that no margin account had been opened by him, compel the conclusion that a margin account was in fact opened by him, and argue that, if the margin account had been opened, the relation of creditor and debtor arose between Davis and Skelly Company, and that, although the stockbroker firm became indebted to the complaining witness for the value of his securities, and civilly liable to him for illegal conversion, the officers were not guilty of embezzlement or of any other crime.

An analysis of the evidence shows that, although there is in the record considerable evidence supporting appellants' version of the transactions involved, nevertheless there are on the other hand facts and circumstances which corroborate the testimony of Davis and support his account of the transactions between the parties and his understanding of the relation thereby created. One of these circumstances is the fact that no margin card was signed by Davis. Although it is not absolutely imperative that a margin card be signed by the customer in the opening of a margin account, as such an account can be opened without the signing of such card, which constitutes a written agreement between the parties and a consent by the customer that the broker may handle his funds and securities in a manner which would render him criminally liable in the absence of such agreement, nevertheless, since such agreement immeasurably extends the privileges of a stockbroker in his dealings with his customer's property, it is almost the universal practice of stockbroker firms to require the signing of such a card as a prerequisite to doing business with such a firm. The transaction here involved wherein the stockbroker firm immediately advanced to the customer $65,000 was not the ordinary stockbroker customer transaction of buying and selling securities, and it would seem that, in view of the unusual character of this transaction, and of the amount involved therein, the stockbroker firm would have been most careful to secure the signature of the customer upon the margin card if the firm in fact intended that a margin account be opened. The other circumstance which strongly supports Davis's testimony is the fact that at the top of statements mailed to Davis monthly, instead of the word "long," which indicates that the broker is holding certain securities of a customer on a margin account, the bookkeeper of Skelly Company, upon instructions from Douglas L. Skelly, had inserted at the request of Davis the following statement preceding the list of securities deposited by him with Skelly Company: "We hold the following securities which are your property." This statement is susceptible of a construction which indicates that the stockbroker firm was holding Davis's securities otherwise than in a margin account. Whatever construction is to be placed upon this statement, the fact that Douglas L. Skelly made the change from the word "long" to the above-quoted statement, in view of the fact that the word "long" meant that the customer's securities were being held in a margin account, may well indicate that Douglas L. Skelly intended at least to convey the idea to Davis that the securities were not held on a margin account. It further appears that these monthly statements were mailed to Davis, containing the statement, "We hold the following securities which are your property," after a portion of said securities had been disposed of by the company. This statement was therefore, of course, a complete falsehood. In view of these admitted circum-

stances which were undoubtedly a departure from the ordinary method of handling a margin account, we cannot say that Davis' testimony to the effect that a transaction different from the ordinary transaction between broker and customer had been entered into by the parties was inherently improbable. This being so, and the trial court having in effect made its implied finding of fact in favor of the prosecution, this court will not disturb the judgment, at least so far as the defendant Douglas L. Skelly is concerned.

[2] In addition to urging the improbability of the testimony of the complaining witness, the defendant R. B. Skelly earnestly insists that evidence indispensable in proof of his guilt is lacking in the record. He points to the fact that, although he was a director and treasurer of the company, he was the owner of only one share of stock, and was in fact only an employee of his brother, Douglas L. Skelly, the active manager of the business. He contends that, if it was not for the fact that he was the brother of Douglas L. Skelly, he would have escaped prosecution just as the other directors escaped prosecution. Unquestionably the record does show that Douglas L. Skelly was the responsible head of the firm, conducted all the negotiations with Davis upon the deposit of Davis' securities, and was almost in effect the alter ego of the corporation. We have carefully examined the record, and are of the opinion that, although the record shows R. B. Skelly was in charge of the trading department of Skelly Company, and that the sales made by Skelly Company with the Russell Miller & Co. were made upon his order, nevertheless there is an entire lack of evidence to prove that he, in fact, was cognizant of the original deal made by his brother, Douglas L. Skelly, with Davis, and was therefore aware that his activity in connection with said securities was criminal or that the securities were pledged or otherwise disposed of in violation of the agreement between his brother and Davis. We are of the opinion that there is a link missing in the chain of proof against this defendant, and that the judgment of conviction as to him is therefore erroneous, and that he is entitled to a reversal of that judgment.

Application was made to this court by appellants for permission to introduce additional evidence. The application was supported by affidavits of two former employees of the complaining witness, Davis, to the effect that in the books kept by them for him no account with Skelly Company appeared as a loan transaction. This evidence is merely cumulative of other evidence produced at the trial of the case, and in our opinion, accepting such affidavits as true, such evidence would not affect in any way our decision herein.

The judgment and the order denying the motion for a new trial as to Douglas L. Skelly are affirmed. As to the defendant R. B. Skelly, the judgment and order denying the motion for a new trial are reversed, and the cause remanded for a new trial.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.



5 Cal.2d 266

FEIG v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

S. F. 15173.

Supreme Court of California.

Jan. 30, 1936.

Rehearing Denied Feb. 27, 1936.

1. Trusts ⇐81(3)

In suit by surviving husband to impress trust on property standing in name of deceased wife with whom he lived in ignorance of divorce obtained by wife, whom he later remarried, mere occasional separation of spouses did not prevent recovery where there was no proof of any period of willful desertion by either.

2. Trusts ⇐89(1)

Evidence, in suit by surviving husband to impress trust on property standing in name of deceased wife, sustained finding that husband continued to live with wife without knowledge that wife had obtained decree of divorce until wife suggested remarrying.

3. Judgment ⇐743(1)

Decree, in proceedings to establish record title to wife's property after fire in which records were destroyed, *held* not to bar subsequent suit by husband to impress trust on property after wife's death, though husband's interest was not expressly protected by decree.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Trusts ⇐90

Whether properties standing in name of deceased wife were her separate properties *held* question of fact in action by surviving husband to impress trust thereon, though husband in guardianship proceedings for wife had specified properties as belonging to her, where there was evidence of agreement that wife should take title to and handle all properties for equal benefit of herself and husband.

5. Appeal and error ⇐1099(3)

Surviving husband *held* not precluded from impressing trust on whole of property standing in name of deceased wife on ground that law of case had been established by Supreme Court decision that he was entitled to only part of property, where former decision was on appeal from nonsuit and effect of opinion was that husband was entitled to some relief.

6. Trusts ⇐89(1)

Evidence in suit by surviving husband to impress trust on property standing in name of deceased wife with whom he lived in ignorance of divorce obtained by wife, whom he later remarried, sustained finding that funds were furnished by husband for purchase of property and establishment of bank deposits.

7. Trusts ⇐81(2)

Surviving husband *held* entitled to impress trust on whole of property standing in name of deceased wife with whom he lived in ignorance of divorce obtained by wife, whom he later remarried, and which property was acquired during time when they were not married, where through wife's fraud husband was led to live with her as husband and was induced to furnish her with funds to acquire property for them as though they were married.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Joseph Feig against the Bank of America National Trust & Savings Association and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 45 P.(2d) 277.

Leo R. Friedman and James J. Harrington, both of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondent.

THOMPSON, Justice.

This cause was transferred to this court for hearing after decision by the District Court of Appeal in order that we might give further consideration to the question of whether the plaintiff is entitled to all or only one-half of the property involved. No question was entertained concerning the correctness of the disposition of other points by the District Court, for which reason we adopt that portion of the opinion, written by Mr. Justice Sturtevant, as follows:

As the surviving husband the plaintiff commenced an action against the defendants to impress a trust on certain real and personal property standing in the name of his wife on the date of her death. On the trial he was nonsuited. An appeal was taken and the judgment was reversed. Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.(2d) 421. The facts presented by that record are quite fully stated in that decision and need not be repeated. After the remittitur went down, other proceedings were had which resulted in a judgment in favor of the plaintiff impressing a trust on all of the property. On the second trial additional evidence was introduced and the particular facts before the court will be referred to as occasion requires. From the judgment entered in favor of the plaintiff the defendants have appealed.

At this time the defendants make two major points. In the first one they contend that the plaintiff was not entitled to anything. In the second point they contend that the trial court in determining the amount of the plaintiff's interest in the property committed prejudicial error in awarding him anything in excess of fifty per cent. thereof.

In contending that the plaintiff was not entitled to anything the defendants attack several specific items of evidence.

[1] In Feig v. Bank of Italy, etc., Ass'n, supra, 218 Cal. 54, at page 58, 21 P.(2d) 421, 422, the court said: "If, as plaintiff contends and his evidence tends to show, *he continuously lived with the decedent* from the date of their marriage in 1889 until the decedent's death in 1929 in absolute ignorance of the existence of the divorce proceeding and the decree therein entered, and innocently and in good faith

believed himself at all times to be the lawful husband of the decedent, he is entitled to an equitable apportionment of the gains made by their joint efforts." (Italics ours.) The defendants stress the language which we have italicized and assert that the doctrine of the cases cited is such as to make it a condition precedent that the plaintiff should have pleaded and proved that the parties continuously lived together as man and wife. They then assert that the evidence shows at times Mrs. Feig was absent in Washington and at other times she was absent in Arizona. The record does not show that these trips were not mere visits and there is certainly nothing to show any period of wilful desertion on the part of either of the parties. The point may not be sustained.

[2] As recited by the court in Feig v. Bank of Italy, etc., Ass'n, supra, it was the contention of the defendants that Mr. and Mrs. Feig were married in 1889; that they were divorced in 1890; that the records of that proceeding were burned in 1906; that the records were restored March 23, 1912; and that the parties were a divorced couple from 1890 to 1921, at which time it is conceded they remarried. It is also a conceded fact that the properties in dispute were accumulated during said period. In this connection the defendants contend that by virtue of the divorce proceeding the plaintiff was wholly concluded. They contend that by virtue of the recitals of the judgment in the divorce proceeding it is conclusively proved in this collateral proceeding that the plaintiff was served with summons. He stoutly denies he was served with a summons but concedes the point of law that he is concluded by the recital. However, he contends there is no presumption that every divorce action is conducted to a final decree nor that the final decree is in favor of the plaintiff. And taking another step he vigorously contends that he never knew he had been divorced until his wife suggested, in 1921, that they remarry. While it may appear that the evidence is strange and out of the ordinary the weight thereof was addressed to the trial court. Furthermore, in this connection it may be properly remarked that the plaintiff sustained his case and corroborated his testimony by the relatives and intimate friends of both parties. Not even a brother of the decedent knew of the divorce until long after the parties had been remarried.

[3, 4] In claiming that the real estate was the separate property of the decedent the defendants call to our attention that on April 24, 1905, the plaintiff executed a deed of gift to the decedent and on March 18, 1912, he executed and delivered a quitclaim deed. Thereupon the defendants assert that the plaintiff will not be heard to claim that he did not give to the decedent his interest in the real estate. The point is not a new one. In Jackson v. Jackson, 94 Cal. 446, 29 P. 957, a set of facts closely similar was involved. Mr. Jackson executed to his wife a deed of gift. Shortly thereafter, for the purpose of correcting that deed, he executed to her another deed of gift, however, under the proof it was held that such facts were addressed to the trier of the facts and not to a court of review.

As will be noted in the decision Feig v. Bank of Italy, etc., Ass'n, supra, it was claimed by the plaintiff that he and the decedent intermarried in 1889; that from that date it was agreed the decedent should be the business head of the family and should handle all properties acquired; and that it was further agreed to place all properties in the name of the decedent in order to carry out said plan. In that connection it was further agreed that the husband and wife should recognize such properties as the accumulation of their joint efforts and in which each should have an equal interest. In the great fire of 1906 the records of title in San Francisco were destroyed. The decedent was advised that she should commence a proceeding to establish the title of record to said property. Stat.1906, Ex.Sess. p. 78. She informed the plaintiff and he directed her to proceed. Nothing was said by either to the effect that the decree to be obtained was to have the effect of dissolving the trust theretofore established. Thereafter a decree known to the bench and bar as a McEnerney decree was obtained in favor of the decedent. Because it did not specifically protect the rights of this plaintiff the defendants contend he is barred by that decree. The point may not be sustained. Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750. The only difference between the instant case and the case cited is in the relation of the date of the trust agreement to the date of the McEnerney

decree. In the instant case the trust agreement was made over twenty years prior to the McEnerney decree and in the Bradley Case it was made only a few months before the McEnerney decree.

Shortly prior to the death of Mrs. Feig it was found necessary to commence guardianship proceedings. The plaintiff filed the petition. Therein, in attempting to specify her properties he named many, if not all, of the items involved in this litigation. The defendants contend that said statement was so inconsistent with the contention now made by the plaintiff as to be determinative. Counsel for the plaintiff freely concede that the contents of said petition constituted an admission as against interest, but they assert that such admission merely raised a conflict in the evidence and that the conflict was addressed to the trial court and not for the consideration of this court. The contention is clearly correct.

[5] It being manifest that the properties standing in the name of Mrs. Feig at the time of her death were not held by her as her separate property, but rather in trust, we are brought to the point where we must determine whether the plaintiff is entitled to the whole thereof as found and decreed by the trial court, or whether he is entitled to only a portion thereof. In this connection it is urged by the appellants that only a portion may be awarded to the plaintiff because the law of the case has been established to that effect by the prior decision of this court, to which reference has been made above. Concretely, they argue that the statement that if the facts were as contended by the plaintiff, "he is entitled to an equitable apportionment of the gains made by their joint efforts" sets at rest the contention of the plaintiff that he is entitled to the whole. We do not understand the opinion to so conclude. Later on the decision declares: "As above indicated, plaintiff was entitled to meet that defense, and, upon amendment of the complaint, to receive such relief, either legal or equitable, as the evidence warrants." Bearing in mind that the former appeal was from a judgment of nonsuit, and considering the opinion as a whole, it is patent we held no more therein than that if the plaintiff's contentions were in fact true he was entitled to some relief, which should be measured by the trial court in accordance with the allegations of the amendments and the facts adduced.

[6] As already indicated, the facts proved and the trial court found that the properties involved were all acquired during the period when the parties were not legally man and wife. It was also found that the funds were furnished by the plaintiff for the purchase of the property and the establishment of the bank deposits. In a general specification, and along with six others, appellants assert that the finding just mentioned is not supported by the evidence. They do not, however, set forth or give a résumé of the testimony to establish that the finding is contrary thereto. Assuming only that a question of its sufficiency is raised, it is an answer to call attention to the fact that the record discloses that the plaintiff regularly turned over his wages to Mrs. Feig for use and investment, and that the record does not show that she put any of her own money into any property or bank.

[7] We are thus brought to the point where we may consider appellant's argument to the effect that the respondent may have no greater interest in the property by reason of the death of Mrs. Feig than he had during her lifetime, and that, in equity, only one-half thereof should be awarded him; citing as authoritative such cases as Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A. (N.S.) 844; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Jackson v. Jackson, 94 Cal. 446, 29 P. 957, and Figoni v. Figoni, 211 Cal. 354, 295 P. 339. These decisions are not, in our opinion, controlling. They proceed upon the theory that, in an action to set aside a void marriage where the parties have lived together under such void marriage and acquired property by their joint efforts, a court of equity may by analogy apply the rules which would obtain with regard to community property, in the absence of fraud or intervening rights of a third party, and divide the property between them. Such is not the instant case. Here by the fraud and concealment of Mrs. Feig plaintiff was led to live with her as her husband, although they were not man and wife. He was induced to agree and did furnish her with funds to acquire property for them as though they were hus-

band and wife, and, so far as he was concerned, under the belief and understanding that when acquired it would be their community property. Hence, under the plainest principles of equity, it should be held that the trust property, although not community by reason of the fact that there was in truth no marriage, should be marked by all the incidents of community property. Whether we view the situation as one where the intent and agreement of the parties, presumed by law, should govern, or whether we view it as one where it is necessary to prevent the consummation of fraud, the ends of justice require that the property should be declared to be held in trust subject to all the incidents which ordinarily accompany community property. It is conceded, as it must be, by appellants that the entire community property acquired prior to 1923, belongs to the surviving husband upon the death of the wife. Therefore, since all of the property herein involved was acquired prior to that time, the whole thereof should go to the respondent, as adjudged by the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; CONREY, J.



5 Cal.2d 222

JEFFERSON v. PIETRONOIA et ux.

S. F. 15390.

Supreme Court of California.

Jan. 27, 1936.

Rehearing Denied Feb. 24, 1936.

1. Reformation of instruments ⇐11

Where original contract for purchase of realty provided for interest, inadvertent omission of interest from second agreement *held* to entitle vendor to reformation of agreement to include interest, especially where vendees paid interest for four years under second agreement.

2. Reformation of instruments ⇐19(1)

Where all parties to contract for purchase of realty were mistaken as to its contents, action for reformation of contract could not be defeated by contention that, since contract was prepared by party seeking reformation, mistake was unilateral.

3. Limitation of actions ⇐96(2)

Right to reform contract for purchase of realty to include interest was not barred by limitations, where plaintiff did not discover omission of interest until point was raised by defendants to justify their default.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. B. Jefferson against Domenic Pietroroia and wife. From a judgment for plaintiff, defendants appeal.

Affirmed.

Alfred J. Hennessy, of San Francisco (George D. Collins, Jr., of San Francisco, of counsel), for appellants.

Leon E. Prescott, of San Francisco, for respondent.

LANGDON, Justice.

This is an action for reformation and other relief with respect to a contract for the sale of real property. Plaintiff's predecessors agreed to sell the property to defendants, under a written contract providing for payment in installments, with interest at 6 per cent per annum on the unpaid balances. Defendants went into possession, and commenced payments. Some time after plaintiff acquired the vendor's rights, defendants fell into arrears, and requested a reduction in the monthly installments. The parties discussed the matter, and arrived at an agreement as to the balance then due, and providing for reducing the payments to $55 per month. The agreement was reduced to writing by plaintiff and signed by the parties in February, 1929. Defendants performed under it for four years and then again fell into default. After a number of demands for performance by plaintiff, defendants advanced the proposition that the new agreement made no provision for interest, and that their payments during the four-year period, applied on the principal, were up to date. Plaintiff then brought this action. The trial court found that the interest provision had been agreed upon but was inadvertently omitted by plaintiff in typing the contract. The court adjudged that the instrument be reformed to conform to the expressed intention of the parties, and,

as so reformed, concluded that defendants were in default, and that their rights thereunder should be terminated. Judgment was accordingly rendered for plaintiff, and defendants appealed.

[1] The evidence amply supports the finding, and, although defendants testified that they never agreed to pay interest, it is to be noted that the first agreement provided for interest, and that, despite their alleged lack of agreement, they made payments in full under the new contract for four years.

[2, 3] Defendants suggest that the mistake here was only unilateral, since plaintiff prepared the writing; but the evidence is clear that, though plaintiff wrote the instrument, all parties were in common mistaken as to what it contained. The further suggestion that the statute of limitations has barred plaintiff's right of reformation is of no force, since defendants fully performed, and plaintiff had no occasion to investigate and discover the facts constituting the mistake, until defendants attempted to justify their default by raising the point that the interest provision had been omitted.

The judgment is affirmed.

We concur: WASTE, C. J.; CONREY, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



5 Cal.2d 191

KIRSCHBAUM v. McCARTHY.

S. F. 15514.

Supreme Court of California.

Jan. 23, 1936.

1. Damages ⇐95

That interest on amount of verdict would exceed plaintiff's earnings at time of injury and probable future earnings *held* not controlling in measuring damages for personal injury.

2. Damages ⇐98

That injured person was totally and permanently disabled, future medical expenses and suffering and other future expenses and other probable afflictions could be considered in fixing damages and determining whether verdict was excessive.

3. Damages ⇐127

Excessiveness of damages in particular case must be adjudged by reference primarily to its own facts.

4. Appeal and error ⇐1004(1)

Unless damages awarded are so grossly disproportionate to compensation reasonably warranted by facts presented as to shock sense of justice, Supreme Court may not exercise power of revision.

5. Damages ⇐132(3)

$50,000 for injuries to nurse 38 years old earning approximately $140 monthly *held* not excessive, where she was totally and permanently disabled, still suffered, and condition was growing worse and might result in insanity, and she required attendants and would expend approximately $300 yearly for medical attention.

Evidence disclosed that before plaintiff, army nurse 38 years old, drawing salary of $100 a month, two meals, and laundry, was injured, she enjoyed normal health, but that as result of injuries she was entirely incapacitated from engaging in employment and would require medical attention for balance of life of $300 per annum, or $9,000 during her lifetime; that she was unable to leave house without attendants; that she suffered distressing pains; that injury inflicted incurable brain condition; and that condition was progressive and might result in insanity or epilepsy.

6. Automobiles ⇐244(11)

In action for injuries caused by automobile collision at street intersection, evidence *held* to support conclusion that eastbound plaintiff entered intersection at time when she had right of way over southbound defendant (St.1923, p. 517, as amended).

7. Automobiles ⇐244(11)

In automobile accident case, evidence that southbound defendant swung over to east side of street in passing around rear end of westbound street car and struck eastbound plaintiff motorist on left side, that collision occurred in southeasterly quarter of intersection, and that plaintiff was not traveling at unlawful speed, *held* to support judgment for plaintiff.

8. Trial ⇐296(4, 5)

In automobile accident case, instruction that eastbound plaintiff had right to assume that person driving south on intersecting street would keep on west side of street while crossing intersection and that no vehicle would approach her from left at time when

her car was beyond and east of medial line of intersecting street *held* proper, when considered with other instructions and with circumstances that accident occurred in southeasterly quarter of intersection.

9. Appeal and error ⇐981
New trial ⇐99

Granting of new trial on ground of newly discovered evidence is discretionary action with trial court, which will not be disturbed on appeal unless abuse of discretion appears.

10. New trial ⇐99

New trial on ground of newly discovered evidence should not be granted where moving party has not shown due diligence in discovering and producing new evidence, nor where evidence is merely cumulative, nor unless it is of such character as to indicate it will render different result on new trial.

11. New trial ⇐102(3)

In automobile accident case, defendant *held* not entitled to new trial on ground of newly discovered evidence where first witness, plaintiff's passenger, was mentioned by plaintiff's counsel in opening statement and defendant had notice of character and importance of her testimony, where defendant knew before trial that second witness, a physician, had been attending plaintiff and where third witness' testimony was shown by affidavits to be too doubtful to justify reversal of trial court's ruling.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Caroline Kirschbaum against P. H. McCarthy, Jr., administrator with the will annexed of the estate of P. H. McCarthy, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 47 P.(2d) 345.

Henry J. Neubarth, James Walter Scott, James J. Harrington, and Myrick & Deering and Scott, all of San Francisco, for appellant.

C. H. Sooy, J. H. Sapiro, and Edwin V. McKenzie, all of San Francisco, for respondent.

CURTIS, Justice.

On appeal of this cause to the District Court of Appeal, that court modified the judgment of the trial court rendered in favor of the plaintiff upon the verdict of the jury, and reduced said judgment from $50,000 to $25,000, and as so modified, the judgment was affirmed. The plaintiff-respondent petitioned this court for a hearing of said cause after said decision of the District Court of Appeal, which petition was granted. The defendant-appellant filed no petition for hearing after said decision, and was apparently satisfied with the decision of the District Court of Appeal modifying said judgment. As the order granting the petition of respondent has set the case at large, all questions presented by the appeal are now before us. The only question, however, argued by counsel for the respective parties after the transfer of said action to this court, is the one involving the verdict of the jury which awarded the respondent damages in the amount of $50,000. The record does not show that the question of excessive damages as fixed by the verdict was raised by the appellant on his motion for a new trial, but does show that it was not raised in his opening brief and that the first reference to that subject is to be found in appellant's reply brief. The inference is quite persuasive that had the amount of damages been so glaringly excessive as to suggest that it was the result of passion, prejudice, or corruption, such infirmity in the verdict would have immediately occurred to appellant upon its rendition by the jury and long before appellant was called upon to prepare his reply brief.

The respondent at the time of her injury was thirty-eight years of age, and was employed at St. Mary's Hospital in the city of San Francisco at a salary of $100 per month, two meals, and laundry, equivalent to about $140 per month. Her life expectancy was 28.9 years. Computed upon the basis of her life expectancy, her aggregate earnings up to the time of her death would be over $48,000. She had expended $2,928.96 for medical and hospital services due to the injuries sustained by her in the collision with the automobile of appellant's testator. Before sustaining said injuries, she enjoyed normal health. She was a professional registered nurse, and had been employed at the Woodland Hospital for seven continuous years, and at the end of that period was superintendent. She also was an army nurse for a short time. As a result of her injuries, she is entirely incapacitated from engaging in any gainful

or remunerative employment. She will require medical attention during the balance of her life, estimated by the medical experts to be the sum of $300 per annum, or almost $9,000 during her lifetime. She is unable to leave her house without an attendant constantly with her. She suffers distressing pains almost continuously. She is perpetually nauseated, and this condition prevails even when she is in bed, where she is confined 60 per cent. of her time. While the injury did not fracture the skull, it inflicted upon her an incurable brain condition which manifests itself in loss of memory, failure of co-ordination, dizziness, and ataxia, or inability to walk straight. She is not only totally disabled in so far as being able to engage in any industrial occupation, but her condition is progressive, and will in all probability deteriorate rather than improve. As one of the physicians testifying in the case describes her condition: "The future is very serious for her—it may go on to true insanity. She may go into epilepsy, or she may become such an invalid that there will be some intermittent disease which may prove fatal." The testimony of the other specialists called on behalf of the plaintiff is in thorough accord with that of the physician just quoted. A claim is made by appellant that respondent was malingering, but this claim was completely refuted by her attending physician and by the specialists called in to examine her. The verdict shows conclusively that the jury was not impressed with such claim.

[1-5] We appreciate that the verdict in this case is an exceedingly large one, but can we say in the light of the evidence in the case, the striking characteristics of which are set forth above, that it is excessive? It may be true that interest on the amount of the verdict would exceed the amount of plaintiff's earnings at the time of her injury and her probable future earnings if she had not sustained her injuries, yet while this rule is sometimes applied to death cases it is not the true rule to apply in measuring damages in personal injury cases. Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601. Especially should this rule not control in the present case where the evidence shows, not only that the respondent is totally and permanently disabled from following any gainful pursuit, but also that she had expended a considerable sum of money for medical and hospital services; that she will be required in the future and as long as she lives to expend further sums for like purposes; that she will require the services of an attendant whenever she leaves home; that she suffers from nausea and other ailments at all times and even when she is confined to her bed; that her condition is progressive, is gradually growing worse, and may result in insanity, or "she may go into epilepsy." All these matters, and probably others, were proper to be taken into consideration by the jury in fixing the damages of the respondent and by the court in passing upon the question as to whether the verdict of the jury was excessive. As has been frequently held, there is no hard and fast rule applicable to the matter of determining the question of the excessive damages in any particular case, and every case must be adjudged by reference primarily to its own facts and circumstances. 8 Cal.Jur. 838, and authorities cited. It is equally well settled that: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision. 8 Cal.Jur. 834; Holmes v. California Crushed Fruit Co. [69 Cal.App. 779] 232 P. 178; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513." Kelley v. Hodge Transportation System, 197 Cal. 598, 610, 242 P. 76, 81; Miller v. Southern California Tel. Co., 216 Cal. 391, 394, 14 P.(2d) 519. Under the rule announced in the above-cited cases, we are of the opinion that the facts in this case foreclose this court from in any way interfering with the verdict of the jury fixing the amount of plaintiff's damages. The contention of appellant that the judgment is excessive cannot be sustained.

In all other respects the opinion of the District Court of Appeal correctly determines the questions presented on this appeal. We, therefore, adopt that portion of said opinion as the opinion of this court upon the questions therein discussed. It is as follows:

This is an appeal from a judgment on a verdict rendered in the court below in favor of the plaintiff for the sum of $50,000, for personal injuries received by her

in a collision between a Ford automobile driven by her and a Duesenberg automobile driven by the defendant's testator. The collision occurred at the intersection of Cole and Hayes streets, in the city and county of San Francisco, about 10:30 a. m. on June 26, 1931. The grounds on which appellant relies for a reversal of the judgment will be dealt with in the order of their presentation, and such facts as appear to be pertinent to a determination of such questions will be given as the occasion for their statement arises.

1. Appellant asserts the evidence shows, without conflict, that the Duesenberg first entered the intersection and had proceeded more than halfway across the intersecting street when the Ford entered the intersection at a high rate of speed and drove directly into the path of the Duesenberg. We assume from this assertion that it is appellant's contention the evidence fails to establish any negligence on the part of the driver of the Duesenberg, or that it does establish, as a matter of law, the existence of contributory negligence on the part of the driver of the Ford. In either case the verdict would not be sustained. The effect of the verdict of the jury in favor of the plaintiff was, of course, a negation of both contentions. As the finding of a jury or of a trial court on a question of fact will not be disturbed by this court if there is any substantial evidence adduced to support it, our present task is to ascertain what evidentiary basis there is for these implied findings.

The two intersecting streets meet at right angles. Cole street runs generally north and south, while Hayes street has a proximate easterly and westerly direction. They are each approximately 40 feet wide from curb to curb. On Hayes street are two lines of street car rails in the center thereof, occupying a total of 15 feet 7 inches of the width of that street. During the brief space of time immediately preceding the collision, a street car was moving slowly along the northerly tracks, in a westerly direction, across the intersection, while the Duesenberg was traveling southerly on Cole street, to the north of the intersection, and some space to the west of the center line of that street. This automobile entered the intersection, passed behind, or to the east of the rear of, the street car, and struck the Ford on the latter's left, or northerly side, at a point somewhere south of the center line of Hayes street. From this statement of the situation it becomes at once apparent that the question of which automobile entered the intersection first, if not the controlling factor, is at least of primary importance in the determination of the issue presently under consideration. By the provisions of the California Vehicle Act in effect at the time of this collision (St.1923, p. 517, as amended), a vehicle first entering an intersection has right of way over one subsequently entering; and, when both enter at the same time, the vehicle to the right has the right of way. As the Ford entered the intersection in question to the right of the Duesenberg, if both cars entered simultaneously, the Ford would have the right of way.

[6] The testimony of two witnesses only is important in determining this question. McCarthy, the driver of the Duesenberg, did not see the Ford until within a few feet of the point of the collision, and hence did not see it enter the intersection, but appellant argues, from other matters testified to by the witness, that it would have been impossible for the Ford to have entered the intersection until after the Duesenberg had done so. If full credit be given his testimony, such a conclusion could properly be drawn therefrom, but obviously the jury did not so consider it. The witness C. R. Pollard was the motorman on the street car which crossed the intersection just ahead of the Duesenberg. While he did not see either vehicle in the act of entering the intersection, he testified to his observations of the positions, directions, speeds, and distances of each vehicle, as well as that of the street car he was operating, at the time when the collision appeared probable, and from these conditions gave his conclusion, both orally on the witness stand, and in a written statement introduced in evidence (defendant's exhibit H), that the Ford entered the intersection first. Without a detailed relation of the testimony of this witness, suffice it to say that his conclusion, based upon his observations above referred to, appear to us to be much more persuasive than does the conclusion to the contrary drawn from the testimony of the witness McCarthy. In our opinion, the evidence amply supports the conclusion that the Ford entered the intersection at a point of time when it had the right of way over the Duesenberg.

[7] Several other matters in connection with this ground of appeal may well be mentioned here. The driver of the Duesenberg asserted that he never passed over the center line of Cole street, but was at all times on his right, or the westerly side of that line, and that the collision occurred while his car was in that position. The weight of evidence, however, appears to be that he swerved to the left or easterly side of the center line of Cole street, in passing the rear of the street car, and that the collision occurred somewhere in the southeasterly quarter of the intersection. The speed of the Ford as an element in the situation does not seem to have received much attention. However, there is sufficient evidence in the record to justify the belief that that car was not traveling at any excessive or unlawful rate of speed at any time, at least within the intersection. From the foregoing observations, it follows that it is our opinion the evidence in this case is sufficient to sustain the verdict of the jury in favor of the plaintiff.

[8] 2. Appellant next challenges instruction X given to the jury by the trial judge. It is in these words: "You are instructed that plaintiff had a right to assume that any person driving in a southerly direction on Cole street would drive on the westerly side of said Cole street across the intersection, and that no vehicle would approach her from the left at a time when her car was beyond and to the east of the medial line of Cole street. This, of course, does not mean that any driver of an automobile has a right to proceed blindly and in disregard of danger which is obvious or which, by the exercise of ordinary care could be obvious, because it is at all times the duty of each person to exercise ordinary care; and this is true even though the negligence of another person caused the danger. It is for you to determine, of course, as I have repeatedly advised you, the facts of the case. It is for you to say whether the car of the plaintiff passed the medial line at the time of the asserted collision." We find no error in the giving of this instruction. When considered in connection with the other instructions given, and the asserted circumstances of the case, it correctly states the law.

[9-11] 3. Appellant's motion for a new trial in the court below, there denied, was based in part on the ground of newly discovered evidence. It is here contended that the lower court was in error in denying the motion made on that ground. The witnesses from whom the new evidence was proposed to be elicited were Mrs. Fambrini, Dr. Burns, and Angelo Cabano. The granting of a new trial upon the ground of newly discovered evidence is largely discretionary in the trial court, and the action of that court will not be disturbed on appeal, unless a case of abuse of discretion is clearly disclosed by the record. It should not be granted where the moving party has not shown due diligence in discovering and producing the new evidence, nor where the same is merely cumulative, nor unless it is of such a character as to indicate that it will render a different result probable on a new trial of the action. Tested by these rules, we will examine this point made for reversal. The trial below began on December 13, 1932, and did not conclude until the evening of December 30, 1932. On the day the trial opened, Mr. McKenzie made an opening statement in behalf of plaintiff in which he stated in part: "We propose to show that at or about quarter after ten on June 26th Miss Kirschbaum left St. Mary's Hospital to make certain rounds in the course of her duties, and at that time one of the Sisters asked her to take home a patient, a clinical patient, who was there present, and that lady's name is Mrs. Fambrini. * * * Miss Kirschbaum drove the car and Mrs. Fambrini got into the car. They proceeded down Hayes Street, that is, towards the Ferry. They drove along Hayes Street on the southerly side of Hayes Street down in this direction, and traversed the projected property line of Cole Street. * * *" From this statement it is apparent defendant had full notice, several weeks ahead of the close of the trial, of the existence of this witness, and of the character and importance of her testimony. Under these circumstances, we are not impressed with the diligence shown. It may be true, as contended, that defendant relied on her being called by the plaintiff, but we suggest that counsel should not, in presenting their case, rely too much on a prediction of what their opponent may do.

The witness Burns was a practicing physician of San Francisco, where the trial was held, and could have been called by defendant at any time. His attendance

on the plaintiff was known to defendant before the trial began.

There were two conflicting affidavits presented on the motion for a new trial, respecting testimony expected to be given by the witness Cabano. Not only is the diligence shown in his discovery doubtful but the value and character of the testimony which he might reasonably be expected to give, in the light of these two affidavits, is too doubtful to justify the reversal of the lower court's ruling on this motion.

4. In appellant's reply brief, exception is taken to the giving of instruction V. This instruction correctly states the law and does not invade the province of the jury.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CONREY, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 257

WRIGHTSON v. DOUGHERTY et al.

S. F. 15389.

Supreme Court of California.

Jan. 29, 1936.

1. Partnership ⇐245(1)

Right of surviving partner to possession of partnership property accrues at death of his partner (Probate Code, § 571).

2. Limitation of actions ⇐83(1)

Action by surviving partner against administratrix of deceased partner for recovery of his interest in stock owned by partnership *held* barred by limitations where not brought within three years after death of partner, since action was one of claim and delivery and not for accounting, and right to possession of partnership property accrued at death of partner (Probate Code, § 571; Code Civ.Proc. § 338).

3. Partnership ⇐244

Administratrix of estate of deceased partner has neither duty nor right to settle affairs of partnership (Probate Code, § 571).

4. Limitation of actions ⇐83(2)

Action by surviving partner to recover his share of partnership personalty from administratrix of deceased partner holding it as trustee is barred where not brought within four years from date administratrix came into possession of property, since survivor's right of action accrued at that time (Probate Code, § 571; Code Civ.Proc. § 343).

5. Limitation of actions ⇐83(1)

Action by surviving partner against administratrix of deceased partner to quiet title to his share of partnership personalty *held* barred by limitations where not brought within three years after death of partner.

6. Pleading ⇐343

Judgment on pleadings *held* properly granted where facts pleaded showed that plaintiff's causes of action were barred by limitations (Code Civ.Proc. §§ 338, 343).

7. Trial ⇐109

Court *held* authorized to grant motion of nonsuit where plaintiff's opening statement showed that his alleged causes of action were barred by limitations (Code Civ.Proc. §§ 338, 343).

8. Courts ⇐481

Overruling of demurrer in one department of superior court *held* not to preclude judge in another department before whom action was set for trial from granting judgment for defendants on pleadings.

9. Limitation of actions ⇐184

Permitting defendants to amend their answers by pleading statute of limitations *held* proper exercise of discretion (Code Civ.Proc. §§ 338, 343).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by H. Wrightson against F. C. Dougherty and others. Judgments for defendants, and plaintiff appeals.

Affirmed.

Robert R. Moody, of San Francisco, for appellant.

Edwin S. Pillsbury and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondents Hilda Carling Ochsner, Hinckley and others.

Jesse G. Benson, of Oakland, for respondent Elizabeth Ochsner Scholz.

Agnew & Boekel, of San Francisco (John D. Gallaher, of San Francisco, of counsel), for respondent Frances A. Ochsner.

A. C. Agnew and Rogers, Clark & O'Brien, all of San Francisco, Jesse G.

Benson, of Oakland, and James P. Sweeney and Harris F. Shaw, both of San Francisco, for other respondents.

W. M. Cannon, of San Francisco, for respondent Hilda Carling Ochsner individually.

CURTIS, Justice.

Viewing the allegations of plaintiff's complaint as amended most favorably to the plaintiff, the following facts are stated therein. Washington H. Ochsner was indebted to plaintiff in the sum of $12,500. On January 24, 1927, said Ochsner was the owner of 100 shares of stock of the Universal Oil Company, and on said day plaintiff and Ochsner entered into an agreement that in consideration of the cancellation of said indebtedness by plaintiff, he and Ochsner would own said 100 shares of stock as copartners, and that the certificate evidencing said shares of stock should remain in the name and possession of Ochsner as it had been before said agreement. In pursuance of this agreement, Ochsner continued in possession of said stock up to the time of his death which occurred on April 11th of the same year. After his death, defendant Hilda Carling Ochsner was appointed the administratrix of his estate, duly qualified as such administratrix, and as such administratrix came into the possession of said shares of stock and has so continued in possession thereof. Since said agreement of partnership had been entered into by the plaintiff and Ochsner, a large sum of money had accumulated as royalties and income on said stock, which sum of money was in the custody of the superior court of the city and county of San Francisco, and under various agreements entered into by the Universal Oil Company, that company became entitled to said sum of money, and the plaintiff by reason of his partnership interest in said 100 shares of stock of the Universal Oil Company was the owner of one-twentieth of said sum of money. The capital stock of said Universal Oil Company consisted of 500 shares. Plaintiff had, prior to the commencement of said action, demanded of said administratrix and the other defendants one-fourth of said 100 shares, or twenty-five shares, and one-fourth of the royalties and income from 100 shares of stock, that is to say, one-twentieth of said sum of money in the custody of the superior court of the city and county of San Francisco, but that the defendants had refused to deliver said shares of stock or pay to plaintiff any part of said sum of money. In a second cause of action plaintiff alleged that he was the owner of said twenty-five shares of stock of the Universal Oil Company, and the royalties and income therefrom, that the defendants without right claimed some interest in said shares of stock and the royalties and income therefrom, and asked to have his title to said stock, royalties, and income quieted as against the defendants in said action. The various defendants answered. We are not concerned with any of the defendants except the defendant Hilda Carling Ochsner, as administratrix of the estate of Washington H. Ochsner, deceased, and defendant Frances A. Ochsner, for the reason that while judgments were rendered against plaintiff and in favor of certain of the other defendants, the appeal herein only involves those judgments rendered in favor of said administratrix and said Frances A. Ochsner, respectively. The answer of these two defendants consisted of denials of the allegations of plaintiff's complaint as amended (which we shall hereafter refer to as plaintiff's complaint), affirmative defenses, and the statute of limitations, as contained in certain sections of the Code of Civil Procedure. Upon the calling of said action for trial, the attorney for the plaintiff made an opening statement as to the facts which the plaintiff was prepared to prove at said trial. At the close of said opening statement, counsel for the respondents herein moved the court for a nonsuit, and for judgment on the pleadings on the ground that it affirmatively appeared from said opening statement and on the face of plaintiff's complaint that plaintiff's alleged cause of action was barred by the statute of limitations, and particularly by sections 337, 338, 339 and 343 of the Code of Civil Procedure. After said motions were made, the plaintiff's counsel was asked by the court whether he desired to amplify his opening statement or make any further statement, or add to the statement of facts recited in his opening statement, to which inquiry, the attorney for plaintiff replied that he did not desire to make any further statement. The opening statement of plaintiff's counsel followed in the main the allegations of his complaint, and did not include or contain the statement of any material facts outside of the allegations of said complaint. The motions made by counsel for respondents after argument were

granted and subsequently formal and separate judgments were rendered dismissing said action as to the respondents based upon the orders granting said motions for nonsuit and judgment on the pleadings. From these judgments the plaintiff has appealed.

[1, 2] The principal contention of the appellant is that the first cause of action of his complaint set forth a partnership between himself and the deceased Ochsner and that the statute of limitations does not run against a partnership relation until the business of the copartnership is substantially closed. While this principle of law is properly applied to an action between partners, and in actions against a surviving or liquidating partner, we are not convinced that it has any application in an action by a surviving partner against one withholding from him the possession of partnership property, even though such person be the personal representative of the deceased partner. Upon the death of one partner, the surviving member of the firm has the right to the possession of all of the partnership property with the corresponding duty to settle the affairs of the partnership and pay over to the executor or administrator of the deceased partner, any balance due the estate of his deceased partner. Section 1585, Code Civ. Proc., now section 571 of the Probate Code; Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573. It necessarily follows from the provisions of this section of the Code that the right of the surviving partner to the possession of the partnership property accrues at the death of his partner. The action, being one for the recovery of possession of personal property, would be an action of claim and delivery and not for an accounting. Fong Sing v. O'Dell, 50 Cal.App. 55, 57, 194 P. 745, 746. In that case, which was instituted by the surviving partners against the estate of their deceased partner for the recovery of personal property, the court said: "The survivors herein being entitled to the possession of the property of the partnership, it would, of course, follow that they would have a cause of action against the administrator of the estate of one of the partners, who had taken possession for the estate of some of the property and refused to deliver it over to said survivors. Quite clearly, though, the action would be in claim and delivery, and not in equity for an accounting." That case was cited with approval in the opinion rendered in Swanson v. Siem, 124 Cal.App. 519, 12 P.(2d) 1053, 1054, which was an action by the surviving partner against the administratrix of the estate of the deceased partner for the possession of partnership property. In its decision the court said: "It is apparent from the pleadings this is a proper suit in replevin on the part of the surviving partner, under the provisions of section 1585 of the Code of Civil Procedure (section 571, Probate Code), to regain and 'continue in possession of the partnership, and to settle its business.' Fong Sing v. O'Dell, 50 Cal.App. 55, 194 P. 745; Perelli-Minetti v. Lawson, 205 Cal. 642, 651, 272 P. 573. This action is essentially one of replevin. The demand for an accounting to determine what property actually belongs to the partnership assets does not change the nature of the proceeding. The requested accounting is merely incidental to the demand for possession of the property."

An action in replevin for the possession of personal property is barred within three years from the date of its accrual. Section 338, Code Civ.Proc. The present action as set forth in the first cause of action, being essentially one in replevin, was therefore barred by the provisions of section 338 of the Code of Civil Procedure. The opening statement of plaintiff's counsel recited no fact which would take the action out from under the bar of the statute. Respondents' motions based upon that ground were therefore properly granted. The fact that appellant sought to recover only his share of the partnership property, that is to say, one-fourth of the shares of stock and the profits therefrom, does not help appellant's position. If he ever had any right to said property or any part thereof, either as a surviving partner or in his individual right, such right accrued to him at the death of his partner, and any right of action to recover such interest in said property would be barred by the statute three years from the date of its accrual. Appellant hangs his hope to maintain this action upon the claim that in his pleadings he asks for an accounting and that the statute of limitations does not begin to run against him until the business of the copartnership is substantially closed. We have shown, however, that the accounting is merely incidental to this right to the partnership property. It follows, therefore, if his right to recover the property itself is barred, any incidental right he might have in connec-

tion with the ownership of said property could not be maintained.

[3] The authorities cited by appellant in support of his contention that the statute of limitations does not begin to run against a partnership relation until the business of the partnership is substantially closed have no application to the present action. These authorities involve proceedings either between living partners, or proceedings against surviving or liquidating partners, whose duty it was to settle the business of the copartnership and distribute the balance remaining in their hands to the parties entitled thereto. Hendy v. March, 75 Cal. 566, 17 P. 702, cited by appellant, was an action between partners wherein one asked for an accounting by the other. The question at issue was whether any partnership existed between the parties. The court held that there was a partnership, and therefore an action for any accounting was not barred by the statute of limitations. Gilmore v. Ham, 142 N.Y. 1, 36 N.E. 826, 40 Am.St.Rep. 554, to which the appellant has asked us to give our special attention and consideration, was a suit by one partner against his copartner after dissolution of the partnership, the copartner acting as the liquidating partner. In that action the court held that the liquidating partner had a reasonable time after the dissolution of the partnership to settle the partnership affairs before he could be called to account by his partner. In other words, the retiring partner's right to an accounting did not accrue upon the dissolution of the partnership, but only after the liquidating partner had had a reasonable time in which to settle the affairs of the partnership, and accordingly the statute of limitations did not begin to run until this reasonable time had elapsed. It is manifest, we think, that the case of Gilmore v. Ham has no application to the present action. In that case the liquidating partner had the right and duty to settle the affairs of the partnership, and, of course, he could not be called to account until he had a reasonable time in which to perform that duty. In the present action the administratrix of the estate had neither the duty nor the right to settle the affairs of the partnership. Tompkins v. Weeks, 26 Cal. 50, 51; Cooley v. Miller & Lux, 168 Cal. 120, 142 P. 83. That right and duty lay solely with the appellant, and in the exercise of that duty he had the right to the possession of the partnership property immediately upon the death of his copartner and could sue and recover the same from the administratrix or any other person who refused to deliver to him the possession of said property. While in an action against him the statute of limitations would not begin to run until he had substantially closed the business of the partnership, in an action by him to recover property of the partnership, the statute would begin to run immediately upon the accrual of his right to sue for the possession of the partnership property which was the date of the death of his copartner. It has been expressly held by the court that no action in equity for an accounting will lie by the surviving partner against the administrator of the deceased partner, and that where the surviving partner seeks relief against such administrator, his remedy is to proceed under section 1585 of the Code of Civil Procedure, which section "gives to the surviving partner ample power to take possession of the property of the partnership, and wind up its affairs. It necessarily follows that he does not need the interposition of a court of equity to aid him in doing that which he has ample authority to do himself." McKay v. Joy, 70 Cal. 581, 11 P. 832.

[4] Even if we regard the administratrix of the estate a trustee as to partnership property of which she had come into possession, she was an involuntary trustee and appellant's right of action accrued immediately upon the property coming into her possession, and was barred by section 343 of the Code of Civil Procedure. Norton v. Bassett, 154 Cal. 411, 97 P. 894, 29 Am.St.Rep. 162; Barritt v. Barritt, 132 Cal.App. 538, 23 P.(2d) 54.

[5, 6] In view of the foregoing principles of law, there can be no question but that the facts stated by plaintiff's counsel in his opening statement in support of the allegation of plaintiff's first cause of action were not sufficient to show that appellant was entitled to any recovery against respondents or either of them. As to appellant's second cause of action wherein he seeks to quiet his title to personal property, it was also barred by section 338 of the Code of Civil Procedure. In the opening statement of counsel for appellant he stated no facts which would take either cause of action out of the bar of the statute. Respondents' motions for nonsuit, therefore, were properly granted. As substantially the same state of facts appear in the pleadings as were stated in the

opening statement, the motions for judgment on the pleadings were also properly granted. These motions were also granted on the ground of laches on the part of the appellant. In view of what we have said relative to the propriety of granting said motions upon the insufficiency of the facts appearing in either the opening statement or in the pleadings, it is unnecessary for us to pass upon the question of laches as a proper ground for the granting of said motions. In the foregoing discussion, we have assumed that the complaint sufficiently alleged the existence of a copartnership between appellant and Ochsner. We expressly refrain from passing upon the sufficiency of the complaint in that respect, nor do we wish to be understood in anything we have said in the course of this opinion as holding that any partnership ever existed between said parties. The questions are before us merely upon the pleadings and upon appellant's statement of facts which he expected to prove in support of his pleadings.

[7] The contention of appellant that the court is without authority to grant a motion of nonsuit upon plaintiff's opening statement finds no support in the authorities. In fact, the authorities are to the contrary. 8 Cal.Jur. 550; Bias v. Reed, 169 Cal. 33, 145 P. 516; In re Estate of McNeil, 155 Cal. 333, 100 P. 1086; Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 26 L.Ed. 539.

[8] After the plaintiff had filed his complaint herein, the respondents filed a general and special demurrer to said complaint. The demurrer came on for hearing in a department of said superior court before a judge of said court other than the court and judge before whom said action was set for trial. On the hearing the court overruled said demurrer. Appellant now contends that as another judge in another department of said court had overruled said demurrer and thereby sustained the validity of said complaint, the trial court was bound by the previous order and was without authority thereafter to grant a motion for judgment on the pleadings. This contention is without merit. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717; Howe v. Board of Supervisors, 118 Cal.App. 306, 5 P.(2d) 28.

[9] The court permitted respondents to amend their answers by setting up section 343 of the Code of Civil Procedure as a bar to plaintiff's cause of action. It is claimed by the appellant that it was an abuse of discretion on the part of the trial court to permit the answers to be amended by the pleading of the statute of limitations. Appellant cites certain early cases which seem to support his position, but the more recent decisions of this and the District Courts of Appeal have laid down a contrary rule, which has been stated as follows: "It is, however, thoroughly settled that the granting or refusing of leave to amend an answer, where leave is required, is a matter committed to the sound discretion of the trial court. This is true of amendments for the purpose of setting up the statute of limitations, as well as other amendments." Trower v. City and County of San Francisco, 157 Cal. 762, 769, 109 P. 617, 620; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 197, 106 P. 715, 21 Ann.Cas. 1279; Fontana Land Co. v. Laughlin, 199 Cal. 625, 636, 250 P. 669, 48 A.L.R. 1308; St. Paul Title & Trust Co. v. Stensgaard, 162 Cal. 178, 180, 121 P. 731, 39 L.R.A.(N.S.) 741; People v. Honey Lake Valley Irr. Dist., 77 Cal.App. 367, 374, 246 P. 819; 16 Cal.Jur. 619.

We find no error in the record justifying a reversal of the judgments herein. They are, and each of them is, therefore, affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CONREY, J.; THOMPSON, J.; SEAWELL, J.

10 Cal.App.2d 635

ZELLERBACH PAPER CO. v. VIRDEN PACKING CO.

1 Civ. 9606.

Supreme Court of California.

Feb. 13, 1936.

In Bank.

On application for hearing in the Supreme Court.

For prior opinion, see (Cal.App.) 53 P. (2d) 163.

PER CURIAM.

The petition for hearing after decision by the District Court of Appeal, First Appellate District, Division 1, is denied. We withhold our approval of that portion of the opinion which holds that the guaranty relied upon by appellant is not a continuing guaranty. Upon that question we expressly refrain from expressing any opinion.

5 Cal.2d 253

GENERAL PIPE LINE CO. OF CALIFORNIA v. STATE BOARD OF EQUALIZATION et al.

S. F. 15415.

Supreme Court of California.

Jan. 29, 1936.

1. Taxation ⇐317(2)

Constitutional amendment which provided that "all pipe lines, flumes, canals, ditches and aqueducts not entirely within limits of any one county" and all property, other than franchises, of public utilities should be assessed by State Board of Equalization *held* to make Board of Equalization assessor of two classes of property enumerated including pipe lines whether or not extensive, which were used for private and not for public purposes, as against contention that provision applied only to property of public utilities (Const. art. 13, § 14, as amended [see St.1933, p. 3074]; Pol.Code, § 3663a).

2. Constitutional law ⇐14

Where language of constitutional amendment is plain and unambiguous, there exists no room for construction.

3. Taxation ⇐317(2)

Words "pipe lines" in constitutional amendment providing method of assessment for purposes of taxation of pipe lines not entirely within limits of one county *held* to include not only pipe lines but all appurtenances necessary to their proper functioning as such (Pol.Code, § 3663a; Const. art. 13, § 14, as amended [see St.1933, p. 3074]).

[Ed. Note.—For other definitions of "Pipe Line," see Words & Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action for declaratory relief by the General Pipe Line Company of California against the State Board of Equalization, and others. Judgment for plaintiff, and defendants appeal.

Reversed in part, and affirmed in part.

Prior opinion, 47 P.(2d) 702.

U. S. Webb, Atty. Gen., H. H. Linney and John J. Dailey, Deputy Attys. Gen., Everett W. Mattoon, Co. Counsel, of Los Angeles, and S. B. Kaufman, Dist. Atty., of Santa Ana, for appellants.

Eugene D. Bennett, of San Francisco, W. L. Appleford, of Los Angeles and Harris F. Shaw and Martin J. Weil, both of San Francisco, for respondent.

PER CURIAM.

A rehearing was granted in this case in order that we might consider and determine the issue as to what properties are included within the term "inter-county pipe lines," for purposes of taxation. We are satisfied with our previous determination of the major controversy, and accordingly adopt the following portion of our original opinion by Mr. Justice Thompson as part of our present opinion:

The plaintiff commenced this action for declaratory relief, and secured a judgment, from which the defendants prosecute this appeal.

[1,2] The appellants and respondents agree upon the question involved, which is as follows: "Is it the duty of the State Board of Equalization under the provisions of section 14 of article 13 of the Constitution and section 3663a of the Political Code, to assess the intercounty oil pipe line of plaintiff company, when such property is used for private and not public

utility purposes, or should such property be assessed by local assessors?"

The pertinent language of the section referred to reads as follows: "All pipe lines, flumes, canals, ditches and aqueducts not entirely within the limits of any one county, and all property, other than franchises, owned or used by (1) railroad companies including street railways, herein defined to include interurban electric railways, whether operating in one or more counties, (2) sleeping car, dining car, drawingroom car, and palace car companies, refrigerator, oil, stock, fruit and other carloaning and other car companies operating upon the railroads in the State, (3) companies doing express business on any railroad, steamboat, vessel or stage line in this State, (4) telegraph and telephone companies, (5) companies engaged in the transmission or sale of gas or electricity, shall be assessed annually by the State Board of Equalization, at the actual value of such property.

"All property so assessed by said board shall be subject to taxation to the same extent and in the same manner as other property."

Section 3663a of the Political Code requires the Board of Equalization to assess the property enumerated in section 14, article 13, of the Constitution (as amended, see St.1933, p. 3074), giving them the authority to exact and require the information for that purpose.

In the instant case, the board required the respondent to report upon its pipe line, part of which is in Orange county and part in Los Angeles county, whereupon this action was commenced to determine the right of the board to assess.

The appellants insist that the plain, unambiguous language of the constitutional amendment places the responsibility upon the Board of Equalization, while the respondent argues that the amendment was adopted for the sole purpose of returning the property of public utilities to the tax rolls of the counties and hence should be construed to refer only to property of public utilities.

It is to be observed that proposition 30, which was adopted by the people at the special election held in June, 1933, included not only the amendment now under scrutiny, but also a number of other constitutional changes dealing with such subjects as appropriations from the general fund, power of the Legislature to tax counties and cities, the limitation on expenditures by political subdivisions of the state, appropriations for the support of schools by the state, taxation of banks and several others. In fact, the tax structure of the state was to a large extent recast. When we read the language of section 14 of article 13, already quoted, we notice that the words "All pipe lines, flumes, canals, ditches and aqueducts not entirely within the limits of any one county, and" might have been omitted from the amendment had it been the intent to include within its scope only the property of public utilities. In other words, there are two classes of property enumerated in the section—first, pipe lines, flumes, etc., and second, all property, other than franchises, of public utilities. We entertain no doubt that the clearly expressed intent of the amendment was to make the Board of Equalization, for the sake of uniformity and in order to avoid the temptation which might exist in one of the counties to assess at more than its just proportion, the assessor of the property described, whether the lines or ditches be extensive, as in the case of a water department of a municipality, which in legal parlance is more properly classified as a municipal utility than as a public utility, subject to the jurisdiction of the railroad commission (see 22 Cal.Jur. 9; City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425; Water Users', etc., Ass'n v. Railroad Commission, 188 Cal. 437, 205 P. 682; Jochimsen v. City of Los Angeles, 54 Cal.App. 715, 202 P. 902), or comparatively small as may be the case otherwise. One of the first rules of construction is that where the language is plain and unambiguous there exists no room for construction. We think such is the present case.

[3] Plaintiff contends that the court below erred in its finding as to what items of property were included within the term "inter-county pipe line." The position of plaintiff is that if the Board of Equalization be held to have the power to assess such property, it must confine its assessment strictly to the "pipe line"; that it cannot assess pumps, boilers, engines, etc., which, though part of the system and necessary to its operation, are not pipe lines. This is, in our view, a narrow and unwarranted interpretation. We think it clear that the pipe line herein includes not only

the pipe, but the appurtenances necessary to its proper functioning as such. Evidence as to what were these appurtenances was submitted to the court below, and the finding of that court is, in our opinion, a reasonable and proper determination of the items constituting plaintiff's pipe line. The court found that it included the following: "The line of pipe, together with couplings, collars, valves and fittings, with protection covers; the structures supporting or encasing the pipe, above or below ground or under water; the pumps, boilers, engines, motors, manifolds, intakes, header station, control valves and auxiliary equipment attached to and connected therewith and necessary to the operation of the said major station units, receiving, shipping, flow, balance and surge tanks, together with the suction from leased storage tanks, to, by and through pumping stations, when such pumps, tanks and so forth are essential and part of and necessary to the use and operation of the pipe line."

The judgment is reversed, save as to the finding on the issue of the items constituting plaintiff's pipe line, and on that issue the finding and judgment of the court is approved and affirmed.



5 Cal.2d 175

COLLYER v. S. H. KRESS CO. et al.

S. F. 15477.

Supreme Court of California.

Jan. 22, 1936.

1. False imprisonment ⇐10

Ordinarily, owner of property in exercise of his inherent right to protect it may restrain another who seeks to interfere with or injure it.

2. False imprisonment ⇐13

In action for false imprisonment, probable cause by defendant to believe that plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, constitutes a defense, provided detention was reasonable.

3. False imprisonment ⇐13

Probable cause as a defense in false imprisonment cases constitutes that justification for arrest which may be announced by statutory enactment (Pen.Code, § 837, subd. 1).

4. False imprisonment ⇐39

What constitutes probable cause constituting a defense to a false imprisonment action is question of law for court, to be decided in accordance with circumstances at time of detention, unhampered by outcome of charge against plaintiff of the public offense or by conclusions of trial court.

5. False imprisonment ⇐31

In action against store owner and others for false imprisonment consisting in the intercepting and detention of plaintiff for investigation on charge that he had pilfered articles from store counters, evidence *held* to establish legal justification for his interception and detention.

6. False imprisonment ⇐6

Store authorities were entitled to use reasonable amount of compulsion to effect restraint of customer for investigation on charge that he had pilfered articles from store counters.

7. False imprisonment ⇐31

Evidence as to store authorities' detention, for purpose of investigation, of customer suspected of pilfering articles from store counters *held* not to establish such an unreasonable compulsion or detention as to constitute false imprisonment where detention was for only 20 minutes and only compulsion was threat of arrest, which arrest jury found was not improper.

8. False imprisonment ⇐23

Words of reproach allegedly applied to customer by store authorities during period of their detention of him for investigation on charge of pilfering articles from store counters could not be considered in action for false imprisonment.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by D. M. Collyer against S. H. Kress Company and others, for damages for malicious prosecution and false imprisonment. Judgment for plaintiff and defendants appeal.

Reversed.

Prior opinion, 44 P.(2d) 638.

Sylvester J. McAtee, of San Francisco, for appellants.

Elliott Johnson, Jesse E. Nichols, D. W. Brobst, and John M. Cartwright, all of Oakland, for respondent.

THOMPSON, Justice.

This case was transferred to this court after decision by the District Court of Appeal, for the purpose of giving further consideration to the important question of whether a private person may, in the protection of his property, detain another for investigation and whether, in an action for false imprisonment in such a case, probable cause at the time of such detention may be considered as a defense. The statement of facts is taken from the opinion of the District Court of Appeal:

"Defendants appeal from an adverse judgment in an action for damages growing out of accusations of shop-lifting. The sixth amended complaint upon which the case was tried was in two counts, one charging malicious prosecution and the other false imprisonment. The jury found in favor of defendants on the former, and in favor of plaintiff on the latter, assessing his damages in the sum of $3,500. On motion for new trial the court made a conditional order reducing the amount of damages to $1,500, and plaintiff accepted the lesser amount. Among the grounds urged for reversal are insufficiency of the evidence and excessive damages.

"The alleged shop-lifting took place between 4:30 and 5 o'clock on Christmas eve in the basement of a department store in Oakland, operated by the defendant S. H. Kress Company. The store was crowded with customers at the time, and according to defendants' evidence, three persons to-wit, a customer, the store detective Mrs. E. G. Croswell, and her assistant Sidney Schwartz, saw plaintiff pilfer certain articles from the open counters on which they were displayed and put the articles in his overcoat pockets. He was intercepted at the main exit of the store, just as he was leaving, by Mrs. Croswell and Schwartz, and escorted back into the store to a room on the second floor for the purpose of investigating the matter. The testimony is conflicting as to what actually transpired after they entered the room. However, it appears without dispute that plaintiff was there accused of pilfering, and he denied the accusation, stating he had paid for all the articles in his possession. After considerable difficulty, lasting some twenty minutes, during which an attempt was made by Mrs. Croswell forcibly to search him, it was revealed he had in his possession the articles he was accused of having stolen, and he was asked to sign a statement to the effect that he had taken the articles without paying for them. Still insisting he had paid for the articles, he refused to sign the statement. Meanwhile the police had been summoned, and soon after their arrival, at the request of the store management, the police placed plaintiff under arrest and he was taken to the city prison where he was searched, photographed twice and fingerprinted; and about eight o'clock that night he was released through arrangements made by his nephew with the store management. The day after Christmas Mrs. Croswell swore to a criminal complaint charging plaintiff with petty theft; but a few weeks later a jury found him not guilty. At the time this happened plaintiff was seventy years of age, and until about a year prior thereto he had been for approximately six years a deputy constable and process server in Oakland. There is some evidence tending to show that he had been drinking when he entered the store, but he denied that such was the fact.

"There is no substantial conflict in the evidence as to what was said and done on the way to the room to which plaintiff was escorted. Apparently plaintiff made no objection to returning other than to inquire why they wanted him, and in reply Mrs. Croswell told him he knew as well as they. Plaintiff declared, however, he did not know, and just as they were about to ascend the stairway leading to the room he stopped and demanded to know 'what it was all about.' Mrs. Croswell replied, 'Come on, you will learn later,' but plaintiff was not inclined to go further, until Mrs. Croswell threatened to call the police. He then stated she need not do so, that he would go along; and he did without further hesitation. There is a sharp conflict, however, as to what happened after they entered the room. According to the evidence introduced on behalf of defendants, the following occurred: Mrs. Croswell asked plaintiff to remove all of the merchandise from his pockets and he refused to do so. She then asked him to produce the string of electric light sockets, which he refused also to do; whereupon she advanced toward him, saying, 'Well, then I will take them out of your pocket'; but when she attempted to do so plaintiff resisted and during the scuffle which followed plaintiff grabbed her arm and twisted it, and then advanced toward her with his arm raised and fist clenched as if he were going to strike her.

She called for help and two or three other store employees responded. About the same time, unknown to plaintiff, Mrs. Croswell summoned the police; but before they arrived plaintiff reached in his overcoat pocket, took therefrom the disputed four electric light bulbs and string of sockets, which were not wrapped and for which he had no sales tags, and throwing them on a couch in the room, said, 'Here they are. If you think I didn't pay for them I'll pay for them again.' Mrs. Croswell then asked him to sign a document prepared and used by the Kress company in such cases, to the effect that he had taken the articles described therein without paying for them; but plaintiff refused to sign the paper, or to give his name or address, telling her it was none of her business. It was about then that police inspectors Jewell and Trowbridge arrived; whereupon Mrs. Croswell told them in plaintiff's presence she had seen him pilfering, and how after entering the room he removed from his pockets the articles they had seen him pilfer and threw them on the couch; she also related to them the conversation which had taken place up to that time. The officers then asked plaintiff if he had any other articles in his pockets and he replied he had not, whereupon they searched him and found the neckties and suspenders. They too were not wrapped, nor did plaintiff have any sales tags therefor. When plaintiff was asked to explain why the disputed articles were not wrapped and he had no sales tags for them, he replied merely that it was strange he could not purchase goods without having them wrapped and accepting sales tags therefor. Plaintiff's name and address were revealed when he was searched by the police, and Mrs. Croswell again sought to have him sign said document, but he refused to do so; whereupon the store manager, C. F. Clifford, who had entered the room while the investigation was going on, told Mrs. Croswell, in plaintiff's presence, that under the circumstances the only thing they could do was to cause his arrest; and accordingly at Mrs. Croswell's request the officers placed him under arrest, and he was taken to the city prison. The officers took with them also as evidence the string of light sockets and the four bulbs plaintiff was accused of having stolen.

"Plaintiff's version as to what transpired after they entered the room was quite different. He stated that as soon as the door was closed Mrs. Croswell began calling him a 'robber', 'thief', and 'skunk', and said she wanted the things he had stolen downstairs; that she fairly screamed the words at him; that he replied he had purchased and paid for everything he had in his possession; that she then attempted forcibly to search him and he pushed her away with his hands, whereupon she screamed for help and ran out of the room; that she returned immediately, accompanied by other store employees and the manager; that she told the manager she had caught him, plaintiff, stealing, and that he refused to give up the stolen articles. Continuing, he stated he denied having stolen anything, and asked them to take him downstairs to the girl who waited upon him 'and prove he had not paid for the articles', but that they refused to do so; that Mrs. Croswell then produced the document he was asked to sign, but after reading it he refused to do so; whereupon the manager, after hesitating a moment, said to Mrs. Croswell: 'If he don't give up those things we will have to make an example of him.' About this time, so he testified, the police inspectors arrived, and Mrs. Croswell told them he had taken some articles without paying for them and would not allow her to search him; whereupon they searched him and took from his pockets all of the articles in his possession; and shortly afterwards, acting under the manager's instructions, they took him to jail. Plaintiff denied he had placed the sockets and four bulbs on the couch before the inspectors arrived, or that he said he would again pay for them; but in apparent contradiction thereof Inspector Jewell and Clifford both testified that said articles were on the couch when they entered the room, and that the inspectors took from his pockets only the remaining ones. At the trial, in explanation of the possession of the unwrapped articles and the absence of sales tags, plaintiff stated that the neckties and suspenders were wrapped when he purchased them, but that on account of the crowd in the store it was inconvenient for him to carry so many packages so he slipped the articles out of their wrappings into his pocket, and threw the wrappings away; and that upon purchasing the string of light sockets and additional bulbs he told the salesgirl she need not wrap them, that he would put them in his pocket, which he did; and that he had no recollection of having been given sales tags for either."

The cause of action for false imprisonment is predicated upon the twenty minutes or thereabouts between the time the plaintiff was accosted by Mrs. Croswell near the store entrance and the time he was taken into custody by the police officers, during which interval he was detained and questioned by the store employees. No question of false arrest is involved in the case. The arrest made by the police was relied upon as the basis of the cause of action for malicious prosecution, on which count a verdict was returned in favor of defendants. We are here concerned only with the right of the defendant store to detain the plaintiff for the purpose of investigation and to secure a confession, after three persons had seen him pilfer articles from among those displayed.

[1-3] Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it. 11 R.C.L. 805. However, there seems to exist considerable confusion in the cases as to whether probable cause is a defense in false imprisonment cases involving misdemeanors. The broad statement occasionally appears to the effect that probable cause is no defense in actions for false imprisonment. Nelson v. Kellogg, 162 Cal. 621, 123 P. 1115, Ann. Cas. 1913D, 759; Neves v. Costa, 5 Cal. App. 111, 89 P. 860. The cited cases involved unlawful arrests under the authority of illegal process issued in civil actions. In such instances, as in all cases involving solely the legality of the process, it is obvious that probable cause is not pertinent to any issue in the case. Because of like irrelevancy, the statement may properly be made in cases of illegal arrests upon suspicion by a private person where, by statutory authority or otherwise, he is permitted to make such an arrest only when the offense is being committed in his presence. Palmer v. Maine Central R. Co., 92 Me. 399, 42 A. 800, 44 L.R.A. 673, 69 Am.St.Rep. 513; Pandjiris v. Hartman, 196 Mo. 539, 94 S.W. 270; Harris v. Terminal R. R. Ass'n of St. Louis, 203 Mo.App. 324, 218 S.W. 686. However, those authorities which hold, where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner (Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329, 1333; Fenn v. Kroger Grocery & Baking Co. (Mo. Sup.) 209 S.W. 885; Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50, 31 A.L.R. 311, 314, 25 Cor.Jur. 471), must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable. As already indicated, the rule should be different if the offense believed to be in the process of commission relates to the person or property of another. And, of course, we may properly refer to probable cause as a defense in false imprisonment cases as constituting that justification for the arrest which may be announced by statutory enactment. With the foregoing explanation, the authorities are harmonized, and it is made clear that probable cause is a justification for the detention of the plaintiff in the instant cause.

[4, 5] What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court. Davis v. Pacific Tel., etc., Co., 127 Cal. 312, 320, 57 P. 764, 59 P. 698; Mackie v. Ambassador Hotel, etc., Corporation, 123 Cal.App. 215, 11 P.(2d) 3; Allen v. McCoy, 135 Cal.App. 500, 27 P.(2d) 423, 28 P.(2d) 56; Van Fleet v. West American Ins. Co., 5 Cal.App.(2d) 125, 42 P.(2d) 378, 43 P.(2d) 557. So determined, it appears from the record in this case that the defendants were not only justified in detaining plaintiff, but also, under the evidence, would have been justified in arresting plaintiff under the authority of subdivision one of section 837 of the Penal Code.

[6-8] There yet remains the question of whether the detention was reasonable. The consideration of this problem must be promised by the observation, which must be kept in mind at all times during our examination of the question, that the defendants were entitled to use a reasonable amount of compulsion in order to effect that restraint. In our opinion, the evidence in this case does not disclose an unreasonable compulsion or detention. The respondent was detained for the period of about twenty minutes. The compulsion used was a threat of arrest, which arrest the jury found was not improper. The defendants testified that Mrs. Croswell attempted to take the articles out of his pocket, but that he, by the use of force, prevented that act. The words of reproach which plaintiff testified were applied to him are not properly to be considered in an action of this character. The request to sign a statement of his acts was not improper, under the circumstances. In fact, the only way in which defendants could protect their property, if taken, was to ask plaintiff to restore, which if done, in and of itself, amounted to a confession. It nowhere appears, except for the threat of arrest, concerning which we have already commented, that plaintiff might not have left the premises at any time.

No other points require discussion.

Judgment reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.



11 Cal.App.2d 430

BETTOLO v. SAFEWAY STORES, Inc., et al.

Civ. 9921.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1936.

1. Appeal and error ⇐1064(1)
Trial ⇐208

In action against store owner and others for false imprisonment consisting in detention of plaintiff for investigation on charge of pilfering merchandise, instruction directing jury to disregard evidence tending to prove probable cause *held* prejudicial error, since property owner may restrain for reasonable time for investigation one who he reasonably believes had interfered with or stolen his property (Pen.Code, § 837).

2. False imprisonment ⇐13

Where store employee had seen customer pick up article from shelf and conceal it in his pocket, reasonable and probable cause for detention of customer for investigation existed, as respects right of customer to damages as for a false imprisonment.

3. False imprisonment ⇐36

Store customer who had been detained for a reasonable time and upon a reasonable and probable cause for investigation on suspicion of having pilfered merchandise *held* entitled to only nominal damages, if any, where he asked for no exemplary or punitive damages, showed no pecuniary loss, and none other than store employees and friends to whom he gave the information knew of his detention (Civ.Code, §§ 3333, 3360).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Santo Bettolo against the Safeway Stores, Incorporated, C. R. Johnson and another. Judgment for plaintiff, and the named defendants appeal.

Reversed.

Milton L. Selby and Drummond Wilde, both of Oakland, for appellants.

J. W. Coleberd and H. W. Call, both of South San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for false imprisonment and had a verdict for $1,500 against all the defendants. Since there was no evidence even remotely connecting the defendant Morelli with the incident, the trial court granted him a new trial. The other defendants have appealed from the judgment on the verdict.

Plaintiff entered a store operated by the corporation in South San Francisco, gathered some groceries from the shelves, which he put in a carrying bag, and some candy, which he placed in his overcoat pocket. He then went to the checking stand where he exhibited the groceries and paid for them. Two employees had seen him take the candy, and when defendant Johnson learned that it had not been paid for, he followed the plaintiff to the side-

walk and forced him to return to the store. There he was searched, but no candy was found; but it was discovered later among some vegetables at a counter where plaintiff had stood just before leaving the store. Plaintiff was detained about ten or twelve minutes and then permitted to leave. No physical violence or injury is charged; the claim for damages rests solely upon the detention in the store. These facts all stand uncontradicted. Plaintiff did not deny that he had taken the candy, nor that he had been warned to stay away from the store because he had been seen taking groceries on another occasion.

The appellants have advanced five separate grounds for reversal, but, for the sake of brevity, we will limit our consideration to these two—the denial to them of the right to defend on the ground of probable cause, and the excessive damages.

[1] The trial court instructed the jury that it should disregard any evidence tending to prove probable cause, and that such defense was not applicable in actions for false imprisonment where exemplary damages were not asked. The instruction was error and palpably prejudicial. Any person may make an arrest for a misdemeanor committed in his presence. Section 837, Pen.Code. The owner of property may, for the purpose of protecting it, restrain, for a reasonable time and for the purpose of investigation, one who he has reasonable and probable cause for believing has interfered with or stolen it. Collyer v. S. H. Kress Co. (Cal.Sup.) 54 P.(2d) 20; Mackie v. Ambassador Hotel, etc., Corporation, 123 Cal.App. 215, 221, 11 P.(2d) 3; Gisske v. Sanders, 9 Cal.App. 13, 15, 98 P. 43; Allen v. McCoy, 135 Cal.App. 500, 506, 27 P.(2d) 423, 28 P.(2d) 56; Michel v. Smith, 188 Cal. 199, 205, 205 P. 113; Van Fleet v. West American Ins. Co., 5 Cal. App.(2d) 125, 42 P.(2d) 378, 43 P.(2d) 557; Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329.

In the Collyer Case, which was also one in which exemplary damages were not asked, the Supreme Court, referring to the issue of probable cause as a defense, said: "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it. 11 R.C.L. 805." And again: "However, those authorities which hold, where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner (Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329, 1333; Fenn v. Kroger Grocery & Baking Co. (Mo.Sup.) 209 S.W. 885; Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50, 31 A.L.R. 311, 314; 25 Cor.Jur. 471) must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened."

[2] The undisputed evidence shows reasonable and probable cause for the detention. Johnson had seen the respondent pick up the candy and conceal it in his pocket. This was verified by another employee in the store. There has been no denial from the respondent. He was detained less than fifteen minutes, which was not shown to have been an unreasonable time for the investigation.

[3] The excessive verdict cannot be defended. Respondent proved no actual damage of any character. He was unemployed at the time, and had worked but ten days over a period of nine months. After the arrest, he had had reasonably steady employment. The only persons who knew of the detention, aside from the appellants, were respondents' friends to whom he gave the information. None of them thought he had committed an offense, and none caused him any loss of employment or other injury. The verdict of $1,500 was purely a sympathy verdict inspired by prejudice and unsupported by any competent evidence of damage. The respondent rested his demand for compensation on section 3333 of the Civil Code, which fixes the measure of damages in cases of this kind as "the amount which will compensate for all the detriment proximately caused thereby." He did not ask for exemplary or punitive damages, and could not have recovered such under the evidence. If he was entitled to any damages at all, he could have had nothing more than nominal damages within the provisions of section 3360 of the Civil Code. Maher v. Wilson, 139 Cal. 514, 520, 73 P. 418.

The judgment is reversed.

We concur; STURTEVANT, J.; SPENCE, J.

11 Cal.App.2d 170

KELSO v. SARGEANT et al.

Civ. 5456.

District Court of Appeal, Third District, California.

Jan. 9, 1936.

Hearing Denied by Supreme Court March 9, 1936.

1. Taxation ⇐856

Inheritance taxes are not charges upon estate of decedent nor considered as expenses of administration, but are levied upon each share of decedent's estate devised to legatee or inherited by intestate's succession.

2. Taxation ⇐864

Agreement among heirs cannot change right of state to inheritance tax or change basis upon which tax is computed.

3. Taxation ⇐891

Provision that inheritance taxes should be paid by executor but deducted from amount of bequest or amount received under contract changing amount receivable by legatees so that legatees whose interests were contingent would receive immediate payment *held* to require executor to deduct amount of inheritance tax against bequest specified in will from property received under agreement.

4. Appeal and error ⇐717

Memorandum of opinion which was not part of transcript could not be considered on appeal from judgment in action for declaratory relief (Code Civ.Proc. § 1060 et seq.).

5. Action ⇐6

Where pleadings filed by defendants in action for declaratory relief went beyond complaint asking for construction of contract, changing amount receivable by legatees of will, and asking for return of stock certificates placed in escrow for payment of inheritance tax, court could declare rights of parties under contract by fixing amount of tax payable by each and requiring return of stock not required to discharge tax (Code Civ.Proc. § 1060 et seq.).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action for declaratory relief by Maud Sargent Kelso against Howard C. Sargeant, also known as Howard C. Sargent, and Edwin L. Sargeant, also known as Edwin L. Sargent, and others. From an adverse judgment, the named defendants appeal.

Affirmed.

Olin L. Berry, George E. Lawton, and Vincent Surr, all of San Francisco, for appellants.

Farrand & Slosson and Eli F. Bush, all of Los Angeles, for respondent.

Flint & MacKay, of Los Angeles, and Mark A. Walsh, of Burlington, Iowa, for defendants Sargent, Yoakum, and Jones.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was prosecuted under the provisions of section 1060 of the Code of Civil Procedure for the purpose of obtaining declaratory relief. The real purpose of the action was to obtain a judicial interpretation of paragraph IV of a certain contract. The contract was signed by all of the parties to this action, and the paragraph in question is in the following words: "That the executor of said last will and testament is authorized and shall pay, from any moneys in its hands, any and all estate and inheritance taxes, and the specific inheritance tax chargeable against any devise or bequest received under said will, or this agreement shall be paid by the said executor, as aforesaid, but shall be deducted from the amount of such devise or bequest, or the amount received by such party under said agreement."

The agreements entered into by the parties to this action changed the amounts which they otherwise would have received under the will, and the disputed question is as to whether the respective parties should pay the inheritance tax as fixed by the inheritance tax appraiser and chargeable to the respective bequests named in the will, or whether the inheritance tax should be apportioned so that each of the parties would pay the amount of the inheritance tax that might be figured out and considered as charged ratably against that portion of the estate which the respective parties might receive under the agreement. The court interpreted the paragraph to mean that each of the parties named in the will, and also in the agreement, should pay the inheritance tax upon the amount of the bequest named in the will and ascertained by the inheritance tax appraiser according to the provisions of the law relating thereto fixing the amount to be paid by each legatee upon the amount or portion of the estate received by such legatee under the provisions of the will.

The appellants contend that the paragraph should be construed to mean that the inheritance tax should be apportioned

and paid as chargeable against the amounts received under the agreement, and not as fixed and charged by the inheritance tax appraiser against the amount of the devise or bequest received by the respective parties under the terms of the will.

E. W. Sargent died on or about the 2d day of August, 1929, leaving estate in Los Angeles county. The last will of E. W. Sargent, together with two codicils, appears to have been duly admitted to probate on or about the 3d day of September, 1929, and the Title Guarantee & Trust Company, a corporation, was appointed executor. The value of the estate was appraised at the sum of $1,402,295.43. The entire estate of the testator was left in trust to the Title Guarantee & Trust Company, a corporation, with directions to pay out of the income the bequests mentioned therein, as follows: (A) Certain small bequests to various persons amounting to the sum of $1,200; (B) to his widow, Alma M. Sargent, $3,000, in lieu of a family allowance; $50,000 to be paid in ten equal annual installments; and $3,000 per year for life; (C) to Maud S. Kelso, the sum of $5,000 and certain valueless notes; (D) to Ethelyn Jones, $900 per year in equal monthly installments for life, commencing January 1, 1918; (E) to Gladys Carson Yoakum, $900 per year for life; (F) to Reuben Daniels, $300 per year for life.

After the death of Ethelyn Jones, Gladys Carson Yoakum, and Reuben Daniels, the estate was to be distributed as follows: To the children, the issue of Ethelyn Jones, in equal shares, one-sixth thereof; to the issue, if any, of the body of Gladys Carson Yoakum, one-sixth thereof; to Howard C. Sargent and Edwin L. Sargent, in equal shares, two-thirds thereof.

At the date of the death of the testator, Ethelyn Jones was 36 years of age; Gladys Carson Yoakum was 31 years of age; and Reuben Daniels was 75 years of age.

In considering the provisions of the instruments hereinafter referred to, and as an aid to the correct interpretation of paragraph IV of one of the contracts which we have set forth herein, the life expectancy of at least one of the legatees, to wit, Ethelyn Jones and Gladys Carson Yoakum, must be taken into consideration. The appellants in this action were not to receive any of the estate until after these two legatees, together with Reuben Daniels, should have passed away. Reuben Daniels being 75 years of age, his life expectancy need not be considered. The youngest of the three, however, was only 31 years of age, which would give her a life expectancy of between 30 and 40 years.

We have not found in the record any statements of the ages of the appellants in this action, but, from what we have said, the probabilities of their receiving any portion of the estate during their lives was not only contingent, but considerably problematical. While appellants argue that they were giving away something, we make the foregoing statement to show that by the agreements entered into they were receiving a very large present benefit in foregoing a larger contingent sum of money that might never be received.

In addition to what we have said, action was begun by one of the parties to contest the will of the deceased which, had it been successful, would have deprived the appellants of any portion thereof.

The parties named herein, save as to the plaintiff, not being satisfied with the terms of the will, had a conference on or about the 8th day of March, 1930, for the purpose of agreeing upon a distribution of the estate, to the intent and purpose that, by the appellants waiving a portion of their contingent interest, they would receive a definite sum immediately upon distribution, and the other parties to the agreement would receive, as it appears, a sum of money, or a portion of the estate in excess of that portion of the estate which they were to receive under the terms of the will. The plaintiff, not being a party to the first agreement, subsequently entered into an agreement which contained the contested paragraph IV which we have quoted.

The agreement of March 8, 1930, provided for the following distribution of the estate (omitting small items not necessary to mention):

To Alma M. Sargent, 1/24; to Gladys Carson Yoakum, 3/24; to Ethelyn Jones, 3/24; to Howard C. Sargeant and Edwin L. Sargeant, 17/24 in equal shares.

On July 28, 1930, a certain instrument in writing was entered into between the parties herein named, by virtue of which agreement the plaintiff, Maud Sargent Kelso, was to receive $45,000 in addition to the $5,000 given her by will, and provided

for the dismissal of the litigation which she had instituted. In this agreement the quoted paragraph IV appears.

On June 20, 1931, a third contract was entered into, under the terms of which the respective parties placed in escrow with the Title Guarantee & Trust Company certain shares of stock of the agreed value of $75 per share, for the purpose of indemnifying the Title Guarantee & Trust Company in payment of the inheritance taxes authorized to be paid in a previous agreement. Shares of stock were deposited as follows: By Maud Sargent Kelso, 120 shares; Gladys Carson Yoakum, 282 shares; Ethelyn Jones, 276 shares, Alma M. Sargent, 405 shares; Howard C. Sargeant, 853 shares; and by Edwin L. Sargeant, 853 shares.

On May 6, 1931, the inheritance tax appraiser filed his report, and which report was subsequently approved by the court, fixing the inheritance tax chargeable against the parties herein named, based upon the bequests made to them under the will, as follows, to wit: Maud Sargent Kelso, exempt; Ethelyn Jones, amount of tax, $135.16; Gladys Carson Yoakum, $37.09; Alma M. Sargent, $6,871.21; Howard C. Sargeant, $63,964.66; Edwin L. Sargeant, $63,964.66.

The inheritance taxes were fixed by the appraiser upon the value of their respective bequests as calculated by him, based upon the terms of the will.

Restating the controversy, it is insisted by the appellants that the plaintiff should be chargeable with the tax on $45,000 which she was to receive under the agreement; that Ethelyn Jones should pay an inheritance tax on 3/24 of the estate, being the sum she was to receive under the agreement; likewise, that Gladys Carson Yoakum should pay an inheritance tax upon 3/24 of the estate which she was to receive under the agreement; likewise, that Alma L. Sargent should have paid an inheritance tax upon the portion of the estate which she was to receive under the agreement; that Howard C. Sargent should only pay a tax upon 7/24 of the estate which he was to receive under the agreement; and that Edwin L. Sargent should only be chargeable with the amount of tax levied against 7/24 of the estate which he was to receive under the agreement.

This argument is further based upon the assumption that the appellants, in releasing their right to property of the value of $398,999.44, are entitled to have the tax thereon, amounting to the sum of $79,799.88, shifted from their shoulders to that of the other parties named in the agreement. This contention would have some weight were it not for the fact that, as we have shown herein, the appellants were not relinquishing any present interest; they were, in fact, getting present benefit of several hundred thousand dollars in lieu of awaiting termination of a contingency that might not occur in sufficient time to enable them to enjoy any portion of the estate.

The record shows that this cause was first tried, and all the testimony set forth in the transcript introduced, at a hearing had before Hon. Albert Lee Stephens, one of the judges of the superior court of Los Angeles county, who, however, was appointed a judge of the District Court of Appeal for the Second District, and resigned as a judge of the superior court prior to the rendition of any declaratory judgment herein. Thereafter the testimony introduced in the hearing had before Judge Stephens having all been written up, by stipulation of counsel it was agreed that the cause might be heard before Hon. Thomas P. White, a judge of the said superior court, and that the testimony taken at the hearing presided over by Judge Stephens should be considered as reintroduced, read by Judge White, and by him decided. After consideration of the testimony, Judge White drafted findings and entered judgment fixing the rights of the parties, and decreeing that each one of the parties should pay an inheritance tax as fixed by the inheritance tax appraiser.

Upon the hearing had before Judge Stephens and in the testimony set forth and considered by Judge White, it appears that the appellants contended that the language of paragraph IV which we have set forth herein, was ambiguous, and sought by testimony as provided by section 1856 of the Code of Civil Procedure to introduce oral testimony to explain such ambiguity and what the parties meant by the use of the language found in said paragraph. The other parties to the agreement contended that there was no such ambiguity, yet at the same time introduced testimony in support of the construction which was subsequently given by the court to the paragraph. The testimony so introduced shows that one of the witnesses testified to a conversation had

after the contract was signed, in which the statement was made, "Everybody will pay on what he gets," which was afterwards changed to, "Everybody will pay their own taxes." Another witness testifying as to the understanding of the statement was to the effect that each one would pay on "what he gets."

Following the introduction of the oral testimony, a number of letters passing between the parties relative to the payment of taxes, which we do not deem necessary to set forth herein but a reading of which convinces us that, if a finding was proper, as made by the court, as to the understanding of the agreement, there is sufficient testimony to support the conclusion arrived at by the court. However, we will set forth a portion of one letter which was written on December 17, 1930, prior to the filing of the report by the inheritance tax appraiser. This letter was addressed to one of the attorneys for the appellants by Flint & MacKay, attorneys for the respondent, and is as follows: "You will recall that the agreement provided that the inheritance tax, as fixed by the department, should be paid by the Title Guarantee & Trust Company and that the tax so fixed should be deducted by the executor from the sums to be received under the agreement. We believe that the Title Guarantee & Trust Company will be willing to pay the inheritance tax charged against each devisee under the terms of the will and that such amount so charged can be deducted from the amount such devisees receive under the agreement, or the decree of distribution based upon the agreement."

The reply to this letter by Mr. Berry, one of the attorneys for the appellants, does not appear to question the construction given to the contract by the attorneys for the respondent, as above mentioned.

[1] The law is well settled that inheritance taxes are not charges upon the estate of a decedent, nor are such taxes considered as expenses of administration. The tax is levied upon each share of the decedent's estate which is by him devised or bequeathed to a legatee or which such person inherits when any one leaves property, dying intestate. 24 Cal.Jur. p. 460; In re Estate of Chesney, 1 Cal.App. 30, 81 P. 679; In re Estate of Wilmerding, 117 Cal. 281, 49 P. 181.

[2] Agreement among heirs cannot change the right of the state to the inheritance tax, nor does it change the basis upon which the tax is to be computed. In re Estate of Rossi, 169 Cal. 148, 146 P. 430; In re Estate of Holt, 61 Cal.App. 464, 215 P. 124. Other cases might be cited, but the foregoing authorities we deem sufficient.

[3] Paragraph IV, to which we have frequently referred, first authorizes the executor to pay, from any moneys in its hands, any and all estate and inheritance taxes, and then uses the following language: "And the specific inheritance tax chargeable against any devise or bequest received under said will, or this agreement, shall be paid by the executor, as aforesaid, but shall be deducted from the amount of such devise or bequest, or the amount received by such party under said agreement."

At the time this paragraph was written, the inheritance tax had not been fixed. It would seem that the draftsman of the paragraph was uninformed as to whether the tax would be levied against the amount of the devise or bequest under the will or would be levied against the respective portions of the estate which would be distributed to the various parties under the provisions of the agreements into which they had entered. Thus it provides that, if the tax is levied against the amount of the devise or bequest under the will, the executor should pay the same and subsequently deduct the amount of such tax from whatever property should be received by each one of the parties to the agreement; that is, each party to the agreement would have deducted from the amount which he would receive the amount of the tax charged against him on account of the property willed to him by the testator. Had the tax been levied against the respective portions as the property was to be distributed under the agreement, then the contention of the appellants might be supported. No such tax, however, was levied. The tax was simply levied according to the laws of the state of California, irrespective of the property that the various parties interested might, by agreement, divide among themselves.

In order to indemnify the executor, the respective parties placed in escrow certificates of stock which were to be returned to the respective parties in the number of shares to which they were entitled, not necessary to pay the inheritance taxes

chargeable against the respective persons placing the certificates of stock in escrow.

We do not need to enter into a discussion of the inheritance tax charged by the inheritance tax appraiser to the contingent estates which, under the will, the appellants would have received in the event of the contingency taking place during their respective lives, and the argument of counsel that the appellants had no money with which to pay such taxes, other than to state that the circumstances surrounding the execution of the respective instruments appears to have been beneficial to all parties concerned, in that a present enjoyment was insured in lieu of a future contingency.

[4] Following the conclusion of the hearing of this cause before Judge Stephens, appellants, in their brief, set forth that a memorandum of opinion was filed by him to the effect that the inheritance tax should be apportioned according to the amounts received under the agreement, and not as fixed by the inheritance tax appraiser. This memorandum is no part of the transcript, and of course cannot be given any consideration by us. The stipulation of counsel for the hearing of this cause before Judge White we think conclusive.

[5] In the final brief submitted by the appellants, much attention is given to chapter 8 of the Code of Civil Procedure (section 1060 et seq.) relating to declaratory relief. The pleadings in this cause called for a declaration of rights of the parties which embraced slightly more than a construction of the contract. While it is true that the complaint filed by the plaintiff only went to the construction of the contract, and asked for the return of certificates of stock placed in escrow by her, the pleadings filed by the defendants went somewhat further, and we think justified the trial court in not only construing the provisions of paragraph IV, but also justified the court in declaring the rights of the parties under the contract, to wit: The amount of the inheritance tax which each one of the legatees should pay, as fixed by the inheritance tax appraiser, as well as the return of certificates of stock to each one, which might be in excess of the number of shares required to discharge the tax chargeable against the specific legatee placing the same in escrow.

Appellants also in their final brief discussed at length the question as to what should be the form of a declaratory judgment, and that findings are not necessary, and that the judgment entered should be entered in a peculiarly declaratory form, without reference to the procedure usually followed in the trial of civil actions before a court sitting without a jury. While we are inclined to agree with appellants in this particular, a decision or an opinion thereon appears to be unnecessary. The judgment in this case, while not in a declaratory form, is in substance and effect a fixing, not only of the rights of the respective parties, but a determination of the construction which should be given to paragraph IV relative to the payment of inheritance taxes. Being correct in substance, errors in form we consider immaterial.

While the briefs filed by respective counsel have taken a very wide range, what we have set forth herein we think determinative of this cause.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



ANDREWS et al. v. REIDY et al. *

Civ. 9893.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1936.

Hearing Granted by Supreme Court March 26, 1936.

1. Constitutional law ⇐22

Constitutional amendment, having been proposed by Legislature, *held* to take effect on day of election approving amendment (Const. art. 20, § 22, as added in 1934).

2. Constitutional law ⇐24

In view of appeal, trial court's judgment granting treble damages for usurious interest *held* not such "final judgment" as would survive destruction of right of action by constitutional amendment pending appeal, even though no stay bond was filed, and though executions were issued and actions brought against judgment debtor to set aside fraudu-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 832.

lent conveyances (Gen.Laws 1931, Act 3757, §§ 1, 3; Const. art. 20, § 22, as added in 1934).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

3. Usury ⊂⊃134

Right to treble damages for interest paid contrary to usury statute *held* in nature of penalty nonexistent at common law (Gen. Laws 1931, Act 3757, §§ 1, 3).

4. Constitutional law ⊂⊃24

Until litigation is terminated, there can be no "final judgment," as regards divesting of rights thereunder due to constitutional amendment or repeal of statute.

5. Appeal and error ⊂⊃110

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Charles L. Andrews and another against P. M. Reidy and others. From a judgment for plaintiffs and an order denying a motion for a new trial, defendant named appeals.

Judgment reversed, with instructions, and appeal from order denying new trial dismissed.

I. Henry Harris and I. Henry Harris, Jr., both of Los Angeles, for appellant.

Leonard J. Meyberg and Paul M. Joseph, both of Los Angeles, for respondents.

ROTH, Justice pro tem.

[1, 2] Based upon a somewhat elaborate factual background which we find it unnecessary to recite, respondents, as plaintiffs, commenced action against defendant, appellant herein, seeking relief under section 3 of the Usury Law (Stats. 1919, p. lxxxiii; Deering's Gen. Laws 1931, Act 3757), for a violation of section 1 of said act and recovered treble damages for interest paid to and accepted by appellant in violation of said section 1 in the sum of $9,000. The record shows that respondents' action was commenced October 29, 1928, but that judgment was not entered therein until January 23, 1934. This appeal is taken from said judgment, but no stay bond was filed, nor was any agreement of any kind entered into staying the execution of said judgment. On November 6, 1934, after the entry of judgment in this action, and during the pendency of this appeal, the people of the state of California at a general election enacted a new section to the State Constitution by adding section 22 to article 20 thereof. The amendment, having been proposed by the Legislature, took effect on the day of the election. Johnston v. Wolf, 208 Cal. 286, 289, 280 P. 980. By reason of the adoption of the said constitutional amendment, it is not necessary to review the many questions argued by respective counsel, since one point raised in the supplemental briefs of counsel, to wit, that the effect of said amendment is to wipe out respondents' cause of action, is decisive of this appeal.

The appellate department of the superior court of Los Angeles county, in the case of Fenton v. Markwell & Co., 52 P.(2d) 297, 301, decided November 29, 1935, in a solid and well-considered opinion analyzes the effect of the constitutional amendment on the usury statute and the remedies heretofore offered thereby, and holds that the rights and remedies given by the usury statute did not exist at common law and that they are purely statutory, and "the rule in such a case is that the right falls and the statutory remedy ceases with the repeal of the statute, without a saving clause, unless that right has been carried into a final judgment. Napa State Hospital v. Flaherty, 134 Cal. 315, 317, 66 P. 322; People v. Bank of San Luis Obispo, 159 Cal. 65, 67, 112 P. 866, 37 L.R.A. (N. S.) 934, Ann.Cas. 1912B, 1148; Moss v. Smith, 171 Cal. 777, 788, 155 P. 90; Freeman v. Glenn County Tel. Co., 184 Cal. 508, 510, 194 P. 705; Callet v. Alioto, 210 Cal. 65, 67, 290 P. 438; Krause v. Rarity, 210 Cal. 644, 652, 293 P. 62, 77 A.L.R. 1327; Pacific Gas, etc., Co. v. State of California, 214 Cal. 369, 373, 6 P.(2d) 78; Coombes v. Franklin, 213 Cal. 164, 166, 1 P.(2d) 992, 4 P.(2d) 157; see, also, Ewell v. Daggs, 108 U.S. 143, 150, 2 S.Ct. 408, 27 L.Ed. 682; Petterson v. Berry (C.C.A.) 125 F. 902. Here there is no saving clause, and the action was begun and judgment was entered after the repeal of the Usury Law. We find nothing to impair the rule just stated or defeat its application to the present case in Coombes v. Getz, 285 U. S. 434, 52 S.Ct. 435, 76 L.Ed. 866, on which plaintiff relies. It is true that case does reverse the decision of the California Supreme Court in Coombes v. Franklin, su-

pra, but it does not question the rule stated by the California court; it merely holds that the cause of action there is contractual in nature, and hence the rule is not applicable to it."

[3, 4] Respondents concede that the opinion in the Fenton Case is "entitled to the utmost respect," but assert that in the Fenton Case the action was commenced a month after the amendment to the Constitution became effective, whereas, in the instant case, the judgment was entered approximately ten months before the effective date of the amendment, and that, although an appeal had been perfected therefrom, the judgment was for all practical purposes final, since its execution had not been stayed by bond or otherwise. Dehors the record, respondents in their brief go on to assert that executions have been issued on the judgment and returned unsatisfied, that supplementary proceedings have been had against appellant without success, that abstracts of said judgment have been filed by reason of which they had become vested with liens against real property, and, finally, that they have commenced five several actions against appellant in the superior court to set aside fraudulent transfers of real property in order to uncover property to satisfy the judgment in question. The fact that the judgment in the trial court was had before the effective date of the constitutional amendment, does not, in our opinion, affect the application of the principles enunciated by the Fenton Case, nor do any of the actions taken by respondents since entry of judgment in the trial court in an attempt to satisfy said judgment alter the situation. The right created by the usury statute was in the nature of a penalty. There was no such right at common law. There was no saving clause in the repealing statute. The litigation between the parties hereto obviously was not terminated by the entry of judgment in the lower court, when an appeal had been taken therefrom. Until the litigation is terminated there can be no final judgment. A few cases supporting this general proposition are: People v. Bank of San Luis Obispo, 159 Cal. 65, 67, 112 P. 866, 37 L.R.A.(N.S.) 934, Ann.Cas. 1912B, 1148; De Vally v. Kendall de Vally Operalogue Co., 220 Cal. 742, 32 P. (2d) 638; Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Jennings v. Ward, 114 Cal. App. 536, 300 P. 129. Specifically on a comparable factual situation, we consider the case of Anderson v. Byrnes, 122 Cal. 272, 54 P. 821, directly in point. In that case there was an action by a stockholder to recover a statutory penalty from directors of a mining corporation "'for failure to make or post monthly balance sheets, etc., required by act approved April 23, 1880.'" Plaintiff recovered judgment. During the pendency of an appeal from said judgment, the act in question was amended. Plaintiff contended the judgment was a vested right. The court said: "Subsequent to the filing of plaintiff's original brief, and while the appeal from the judgment in his favor was pending in this court, the legislature amended the act under which this litigation was inaugurated. This amendment was most important and substantial,—so important and substantial that it may be said that, so far as this plaintiff's rights are concerned, the act was repealed. * * * If this act of the legislature is essentially penal,—if the $1,000 which he has recovered as a stockholder from the directors is a penalty, and not damages, he has no case. This is eminently true, for the penalty had not yet been enforced, and, as has been said by judges of other courts, 'no person has a vested right in an unenforced penalty.' *Therefore a repeal of the statute before the penalty is enforced is not a deprivation of any vested right.* It follows that the amendment to the statute here under consideration absolutely prevents any further prosecution of this litigation if the statute is penal in character, and the amount recovered in the lower court is in all essentials a penalty." (Italics ours.) To the same effect are Ball v. Tolman, 135 Cal. 375, 67 P. 339, 87 Am.St.Rep. 110; City of Sonora v. Curtin, 137 Cal. 583, 590, 70 P. 674; Krause v. Rarity, 210 Cal. 644, 654, 293 P. 62, 77 A.L.R. 1327; Denver & R. G. Ry. Co. v. Crawford, 11 Colo. 598, 600, 19 P. 673; Western Union Tel. Co. v. Lumpkin, 99 Ga. 647, 26 S.E. 74. In the case of Krause v. Rarity, supra, the court indorses the rule here stated. The repealing statute in that case, however, had a saving clause. The court says, 210 Cal. 644, at page 654, 293 P. 62, 66, 77 A.L.R. 1327: "It is apparent that, if the new section had been enacted without the proviso, the rule contended for by the defendant Rarity would apply, the plaintiffs' cause of action would have been wiped out, and no re-

covery could be had on the judgment against said defendant, for the reason that said judgment has not become final."

There is nothing in the case of Howard v. Howard, 87 Cal.App. 20, 261 P. 714 (cited by respondents) to the contrary. The Howard Case merely holds that a judgment may be final for certain purposes before it is final in law. So in this case the judgment was final in the absence of a stay bond on appeal or some other legal arrangement staying the execution of judgment for the purpose of having an execution issued, but it is not final as permanently defining the rights and obligations of the parties until affirmed on appeal and the time to ask for further hearing has expired. The posting of a stay bond, or the failure to post such a bond is of no importance, except as to the practical consequences which may ensue because of the failure to post such a bond. We hold that the amendment adopted by the people of this state on November 6, 1934, eliminates respondents' right of action and that the judgment of the trial court falls with it.

[5] The judgment is reversed, with instructions to the trial court to enter judgment for appellant. The appeal from the order denying motion for new trial is dismissed, as there is no appeal from such an order.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 604

PEOPLE v. WOODSON.

Cr. 1869.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1936.

1. Indictment and Information ⇐171

To warrant setting aside conviction because of variance between pleading and proof, variance must be material so that accused might be misled in making defense or be in danger of being again put in jeopardy for same offense.

2. False pretenses ⇐38

Evidence that accused by false pretenses induced depositor in loan company to assign depositor's passbook to accused, who obtained money owed to depositor, *held* not material variance from indictment charging that accused unlawfully took property of loan company which was acting as agent for depositor, consisting of money in stated amount.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Marshall W. Woodson was convicted of grand theft, and he appeals.

Affirmed.

Thomas T. Califro and H. L. McAllister, both of San Francisco, for appellant.

U. S. Webb, Atty Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was convicted of the crime of grand theft. He has appealed from the judgment of conviction and the order denying a new trial.

Appellant seeks a reversal upon the grounds that there was a material variance between pleading and proof; that the trial court erred in admitting evidence of a different offense; that the evidence is insufficient to sustain the conviction on the offense charged; that the trial court misdirected the jury and erred in refusing certain instructions offered by appellant.

Appellant did not take the stand at the trial, and the evidence is uncontradicted on all material points. The indictment charged the unlawful taking of money. Appellant concedes the sufficiency of the evidence to show "a theft of a pass-book from Orlando Upton." This being true, we need not set forth the false pretenses employed.

Turning to the indictment, we find that it charged that on a certain date appellant "unlawfully took the property of another, to-wit: Pacific States Savings and Loan Co., a corporation, who was then and there acting as clerk, agent and servant for one Orlando Upton, consisting of money in the sum and amount and of the value of Two Thousand two hundred and eighty two ($2282.00) dollars in lawful money of the United States of America."

The evidence showed that Orlando Upton had on deposit with the Pacific States Savings & Loan Company, the sum of $2,282.05, and that said deposit was evidenced

by a passbook. At the time in question, that corporation was not paying out any part of the principal on any of its deposits. Said corporation had an auxiliary or subsidiary corporation known as Pacific States Auxiliary Corporation. The stock of both corporations was owned by a holding company. The two corporations occupied the same offices and had interlocking directors and officers. The auxiliary corporation was at that time taking assignments from depositors of the building and loan company and was paying said depositors 50 cents on the dollar for such assignments. The assigned accounts were then transferred to the auxiliary corporation on the books of the building and loan company.

Appellant knew these facts, and, by means of false pretenses, induced Orlando Upton to execute and deliver to appellant an assignment to the auxiliary corporation of Orlando Upton's passbook in the building and loan company. The auxiliary corporation thereupon issued its check to Orlando Upton for the sum of $1,142.03. Appellant obtained Orlando Upton's indorsement on said check and thereafter obtained the proceeds thereof.

[1, 2] Upon the foregoing state of facts, we find no material variance between the pleading and proof. The indictment was not a model pleading, and perhaps there was a variance, but the question remains as to whether such variance was material. That this is the real question is shown by one of the authorities cited by appellant. People v. Freeman, 29 Cal.App. 543, 156 P. 994. It is there said (29 Cal.App. 543, at page 544, 156 P. 994, 995), that the test is: "Does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?" We believe that the indictment here sufficiently informed appellant of the criminal act with which he was charged; that he was not misled in making his defense or placed in danger of being twice put in jeopardy for the same offense. In People v. Leavens, 12 Cal.App. 178, at page 185, 106 P. 1103, 1106, it is said: "There may be a difference between getting money directly by handing the coin over in hand and giving a request in writing to a third party who complies with the request and hands it over, but the effect is the same, and the distinction is highly technical. An appeal that depends upon such question for reversal is devoid of merit." See, also, People v. Fewkes, 214 Cal. 142, 4 P.(2d) 538; People v. Whalen, 154 Cal. 472, 98 P. 194; People v. Murakami, 122 Cal.App. 221, 9 P.(2d) 583. Appellant cites and relies upon People v. Meseros, 16 Cal.App.. 277, 116 P. 679, but that case is clearly distinguishable. It involved a question of venue in a prosecution for embezzlement. The prosecuting witness had given defendant two checks in Alameda county for the purpose of having them cashed. Defendant disposed of the checks in San Francisco and there appropriated the proceeds to his own use. He remained in San Francisco until arrested and returned to Alameda county. He was charged with embezzlement of money in Alameda county and was tried and convicted there. The judgment was reversed upon the ground that venue must be proved as charged and that there was no proof of embezzlement of money in Alameda county. The court there distinguished the authorities above cited.

Appellant's contention that the court erred in admitting evidence of a different offense and his contention that the evidence is insufficient to sustain the conviction of the offense charged are so closely related to the point considered above that we need not further discuss them. The claim that the court misdirected the jury and erred in refusing certain instructions might have merit if appellant's claims of material variance could be sustained. But, having concluded that there was no material variance, and it appearing that appellant's guilt was clearly established by the uncontradicted evidence, we find no prejudicial error in the charge to the jury nor in the trial court's rejection of appellant's proposed instructions.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

11 Cal.App.2d 554

KARZ v. DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS et al.

Civ. 9738.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1936.

1. Contracts ⇐303(5)

Oral agreement respecting furnishing of and payment for extra work in construction of house, entered into by owners with contractor after commencement of construction, *held* an independent covenant subordinate to written construction contract, as respects right of contractor to abandon contract because of owner's breach of oral agreement (St.1933, p. 1487, § 9, subds. (1, 7).

2. Contracts ⇐303(5)

Owners' breach of independent and subordinate covenant to pay for extra work furnished in construction of house *held* not to entitle contractor to abandon principal contract for construction of house (St.1933, p. 1487, § 9, subds. (1, 7).

3. Contracts ⇐303(5)

Whether written contract for construction of house and oral agreement respecting furnishing of and payment for extra work were one contract and to be considered as such in determining right of contractor to abandon construction for owners' breach of agreement respecting extra work depended upon intention of parties (St.1933, p. 1487, § 9, subds. (1, 7).

4. Contracts ⇐303(5)

Oral agreement respecting furnishing of and payment for extra work in construction of house, entered into by owners with contractor after commencement of construction under written contract, *held* distinct from written contract, as respects right of contractor to abandon construction for owners' breach of oral agreement (St.1933, p. 1487, § 9, subds. (1, 7).

5. Licenses ⇐38

Action of department of professional and vocational standards, registrar of contractors and contractors' license bureau in suspending contractor's license for violation of Contractors' License Law was conclusive upon every question except questions of jurisdiction (St.1929, p. 1591, as amended).

6. Certiorari ⇐68

Certiorari can be used only to ascertain whether inferior tribunal has exceeded its jurisdiction, and cannot be used to determine whether evidence was sufficient in opinion of reviewing court to support particular decision complained of, provided inferior tribunal had jurisdiction and record discloses substantial evidence to support decision.

7. Certiorari ⇐68

Where tribunal whose decision is sought to be reviewed has acted upon a conflict of evidence and not upon an entire absence of any competent evidence, it has not exceeded its jurisdiction, and reviewing court will not interfere with decision of such tribunal.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Philip Karz against the Department of Professional and Vocational Standards, the Registrar of Contractors of the State of California, the Contractors' License Bureau, and others. From a judgment annulling a decision of the named defendants, the named defendants appeal.

Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for appellants.

Charles J. Katz and Stanley E. Fox, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal from a judgment of the superior court annulling a decision of the appellants herein suspending for sixty days the license of respondent to carry on the business of a contractor in the state of California unless respondent complied with certain conditions contained in appellants' decision.

The record reveals that respondent herein was a licensed contractor under the Contractors' License Law of this state (St. 1929, c. 791, p. 1591, as amended); that on July 27, 1933, respondent entered into a written contract with one S. Snow, whereby respondent, as contractor, agreed to construct a five-room residence with garage for the sum of $1,950, payments to be made from time to time as the work progressed; that after the execution of the written contract Mr. Snow and his wife orally requested of respondent herein that work and materials additional to that called for by the written contract be employed and used, and that respondent agreed thereto, for which extra materials and labor the Snows were to pay, in addition to the amounts provided for in the written contract. It further appears that

subsequent to the making of the oral agreement respondent herein demanded of the Snows payment for extra materials and labor claimed by respondent to have been furnished; that when the Snows refused to make such payments respondent herein ceased operations as a contractor and refused to complete the building. Thereafter the Snows filed a complaint with the appellants herein, charging respondent with a violation of subdivisions (1, 3, 7) and (10) of section 9, of the Contractors' License Law (St.1929, p. 1593, as amended by St.1933, p. 1487). That thereupon a citation was issued to respondent to appear and answer said complaint. On October 10, 1933, a formal hearing was had before the appellants, at which oral and documentary evidence was received and considered by said appellants. Thereafter appellants made and filed their findings against respondent, pronouncing him guilty of a violation of subdivisions (1) and (7) of section 9 of the Contractors' License Law (St.1929, p. 1593, as amended by St. 1933, c. 573, p. 1487), which reads as follows:

"Sec. 9. The registrar of contractors may upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any contractor within the State and shall have power to temporarily suspend or permanently revoke a license issued under the provisions of this act if the holder, while a licensee or applicant hereunder, is guilty of or commits any one or more of the following acts or omissions:

"(1) Abandonment without legal excuse of any construction project or operation engaged in or undertaken by the licensee as a contractor as defined by section 3 of this act; * * *

"(7) Failure in a material respect on the part of a licensee to complete any construction project or operation for the price stated in the contract for such construction project or operation or in any modification of such contract."

By appellants' findings, respondent herein was found not guilty of a violation of subdivisions 3 and 10. The findings further provided for the imposition upon respondent herein of the penalty of suspension of his contractor's license as above set forth.

Appellants herein demurred generally and specially in the lower court to the respondent's amended petition therein. The general demurrer attacked the sufficiency of the facts alleged to constitute a cause for review of the proceedings had before the appellants herein on the ground that:

A. Assuming the alleged oral agreement for extras to be a part of the written agreement and that both are one and the same contract, a failure on the part of the Snows, one of the contracting parties, to perform their part of the oral agreement would not permit the other contracting party to abandon the written agreement and all work of construction provided for therein.

B. That assuming the alleged oral agreement for extras to be separate and apart from the written contract, a failure on the part of the Snows, one of the contracting parties to the oral agreement, to perform their part of said oral agreement would not permit the other contracting party to abandon the work called for by the written contract.

[1, 2] Conceding that the Snows breached their part of the agreement by failing to pay for the extras, the law is well settled in this state that a person is not entitled to rescind or abandon a contract for an alleged breach of that contract when the breach does not go to the root of the consideration. Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356; 13 C.J. 614, § 664. In this case the breach of the oral contract for "extras," which was an independent covenant that did not go to the whole consideration of the written contract for the erection of the dwelling, but which was subordinate and incidental to its main purpose, did not constitute a breach of the entire contract, and, consequently, did not warrant a rescission of the entire contract by the respondent herein, who was the injured party. The latter was bound to perform his part of the contract, and his only remedy for breach was compensation in damages, because failure to perform a subsidiary act under a contract will not ordinarily justify a rescission unless it is of such character as to evince an intent on the part of the person in default to abandon the contract or to be no longer bound by its terms. There is no allegation in the petition from which it could be inferred that the Snows had evinced an intention to abandon both the alleged oral and written contracts, whether considered as one contract or as separate contracts. Indeed, the

allegations of the petition for review conceded that the Snows had fully performed all parts of the written contract, but had declined to make payments alleged to be due under the subsidiary contract for "extras."

"When a covenant or promise goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise, and an action may be brought for a breach of it without averring performance." Ernst v. Cummings, 55 Cal. 179. A reading of the petition for certiorari in the instant case clearly shows that the agreement to pay for the extra labor and materials went only to a part of the consideration, and that the agreement for extra labor and materials was an independent covenant and not a covenant dependent upon the written contract, because, as shown by the allegations of the petition, the fulfillment of the terms of the written contract, without any reference to the oral agreement, would have provided a completely finished home and dwelling, as provided for in said written contract. Respondent, therefore, was not entitled to abandon or rescind both contracts and cease all work in connection with the construction of the dwelling. He was required to proceed with the work, and, if necessary, bring an action at law to collect the amount of the "extras" and any damages he suffered by reason of nonpayment therefor.

[3, 4] We come now to a consideration of the second question raised by demurrer. Whether these two contracts are to be considered as one depends upon the intention of the parties thereto. In the instant case the petition for certiorari shows clearly that the parties intended the written contract as distinct and separate from the oral agreement. The written contract was executed first, and provided for a complete construction of the dwelling house in accordance with plans and specifications which were a part of the written contract. After work had been commenced under said written contract, and during the course of construction of the dwelling, it is alleged that the Snows wanted some extra work done and materials furnished in addition to that called for by the written contract. A separate sum of money was agreed upon to be paid for the extra work and labor, and was in all respects separate from and independent of the written contract. From the petition, it appears that appellants herein at the hearing held before them found that respondent had abandoned the original written contract, and in his petition for certiorari respondent attempts to set up a breach of the subsequent independent oral agreement by the Snows as justification for respondent's abandonment of work under the original written contract. This he cannot do. The demurrer should have been sustained.

[5, 6] As a further ground for reversal, appellants urge that the lower court erred in annulling the decision of appellants because there was in the record at the hearing before appellants substantial evidence to support appellants' findings, and therefore confer upon them jurisdiction to render the decision against respondent.

With this contention of appellants we find ourselves in accord. The writ of certiorari can be used only for the purpose of ascertaining whether the board, officer, or inferior tribunal has exceeded its jurisdiction. The action of the appellants herein sought to be reviewed is final and conclusive upon every question except questions of jurisdiction. The writ cannot be used for the purpose of determining whether or not the evidence was sufficient in the opinion of the reviewing court to support the particular decision complained of, providing the inferior tribunal had jurisdiction and the record discloses substantial evidence to support the decision. Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Central Pac. R. Co. v. Board of Equalization, 43 Cal. 365; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866.

While it is true there was a conflict in the evidence presented to appellants at the hearing before them, yet if the appellants believed the testimony of the complainants, Mr. and Mrs. Snow, and other witnesses who testified at the hearing, such testimony afforded ample grounds for the decision by appellants that respondent contractor had abandoned his contract and failed to complete it.

[7] Where the board or tribunal whose decision is sought to be reviewed has acted upon a conflict of evidence, and where they have not acted upon an entire absence of any competent evidence, it has not exceeded its jurisdiction, and a reviewing court will not under such circumstances interfere with or annul the decision rendered by the inferior tribunal, officer, or board.

Osborne v. Baughman, 85 Cal.App. 224, 225, 259 P. 70.

For the foregoing reasons, it follows that the judgment appealed from should be, and it is, reversed, and the cause remanded, with directions to the court below to enter judgment in favor of appellants in accordance with the views herein expressed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 592

ASSOCIATED WHOLESALE ELECTRIC CO. v. S. H. KRESS & CO. et al.

Civ. 10779.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1936.

1. Mechanics' liens ⇨305

Materialman furnishing materials to subcontractor for construction of building who had foreclosed his lien against owner of building *held* not entitled to deficiency judgment against general contractor, where there was no finding that contractor's bond had been given as provided by mechanics' lien statute (Code Civ.Proc. § 1183).

2. Mechanics' liens ⇨161(4)

Materialman who furnished materials for construction of building *held* entitled to interest only from date of judgment of foreclosure of mechanic's lien and not from date of its recording, since amount of lien could not be determined until adjudicated by court (Code Civ.Proc. § 1183).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by the Associated Wholesale Electric Company against S. H. Kress & Co., S. H. Kress & Co., a corporation, S. H. Kress & Co., a copartnership, the Clinton Construction Company, the Clinton Construction Company, a corporation, and the Clinton Construction Company, a copartnership, and others. Judgment for plaintiff, and named defendants appeal.

Reversed and remanded, with directions.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant S. H. Kress & Co.

Ernest K. Little, of San Francisco, for appellant Clinton Const. Co.

Carl B. Sturzenacker and Hal Hughes, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff furnished to defendant Bert L. Perry, Inc., a subcontractor, materials to be used in a building constructed for defendant S. H. Kress & Co., as owner, by defendant Clinton Construction Company, as general contractor. Defendant Perry failed to pay for such materials, and was adjudicated a bankrupt. Plaintiff thereupon filed suit to foreclose his mechanic's lien and recovered judgment of foreclosure against the property of defendant Kress, with the provision that, should deficiency arise upon the sale on foreclosure, judgment for such deficiency should be rendered against the general contractor Clinton Construction Company. Separate appeals are prosecuted by the defendants owner and general contractor.

[1] Deficiency judgment against the contractor as provided for in section 1183 of the Code of Civil Procedure is determined by the question as to whether the bond provided for in said section has been given. The complaint in this case alleged upon information and belief the giving of such bond, and the answer of defendant owner denied that any bond was given. No finding on the matter appears in the record. Such finding is essential under the circumstances of this case. Roystone Co. v. Darling, 171 Cal. 526, 154 P. 15; Tyler v. J. I. Mitrovich, etc., Co., 47 Cal.App. 59, 190 P. 208.

[2] In its judgment of foreclosure the court allowed interest from the date of recording the mechanic's lien. Inasmuch as the liability of the owner, i. e., the amount of the lien imposed upon its property, is for the reasonable value of the labor done and materials furnished (§ 1183, Code Civ.Proc.), and such reasonable value (although in this case it was found to be the same as the contract price) cannot be determined until the matter has been adjudicated by the court, interest can be allowed only from

the date of judgment. Combs v. Eberhard, 120 Cal.App. 25, 7 P.(2d) 338; Burnett v. Glas, 154 Cal. 249, 97 P. 423.

The judgment is reversed, with directions to the trial court to make findings upon the question of the bond, to determine the correct interest allowance, and to enter judgment accordingly.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 635

LITTEN v. WARREN et al.

Civ. 5446.

District Court of Appeal, Third District, California.

Feb. 5, 1936.

As Modified Feb. 24, 1936.

1. Deeds ⇐133(2)

Deed conveying life estate to grantor's wife with remainder over in fee to designated persons and reciting intention of parties to be that, if one of remaindermen died before termination of life estate, remainder should go to her son, *held* not to vest interest in son of remainderman, but to convey remainder in fee to designated remaindermen.

2. Deeds ⇐124(3)

Fee contemplated by granting clause of deed will not be cut down by modifying or limiting clause which is of doubtful import.

3. Deeds ⇐133(1)

Vesting of future interests is favored as against creating of contingent remainders, which are regarded with disfavor.

4. Judges ⇐51(2)

Contention of disqualification of trial judge on ground that twenty years before trial judge as practicing attorney had caused instrument in question to be placed on record *held* not available where instrument was introduced in evidence by party seeking to disqualify judge, but objection was not made until motion for new trial.

5. Judges ⇐47(1)

Recording of an agreement at request of attorney who later became judge of superior court *held* insufficient to disqualify judge in action involving construction of instrument in absence of timely objection that trial judge had knowledge of contents of instrument or had been attorney for either of parties thereto.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Elmore Litten against George V. Warren and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

David F. Hart, of Santa Maria, for appellant.

Fred J. Goble, T. A. Twitchell, and Morris J. Stephan, all of Santa Maria, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This was an action to quiet title to certain real property in which the court found in favor of defendants.

Ebenezer Hopkins conveyed to Sallie Hopkins, his wife, in the following language a life estate in the property in question, with remainder over "unto the party of the second part (Sallie Hopkins) a life estate with remainder in fee to David Charles Hopkins and Mary Litten, nee Hopkins, all of those certain parcels of land. * * *

"It is hereby further witnessed and declared to be the intention of the parties hereto that if the said Mary Litten, nee Hopkins, should die before the termination of the life estate hereby created, that in such event, the above estate created remainder should go to her son Elmore Litten and that in case of the death of both said Mary Litten, nee Hopkins, and her son Elmore Litten before the termination of said life estate, then the whole estate hereby created in remainder shall go to said David Charles Hopkins. * * *

"To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, during her natural life and subject to the estates in remainder above created."

Thereafter David Charles Hopkins conveyed to Mary Litten Young, formerly Mary Litten, his interest and remainder. Some time later Mary Litten Young conveyed all of her right, title, and interest in the property to her mother Sallie Warren, the life tenant. Thereafter Mary Fletcher, formerly Mary Litten Young, died, leaving three children, Elmore Litten, Charles

Young, and Maxine Fletcher. Shortly after the death of her daughter, Mary Fletcher, Sallie Warren, formerly Sallie Hopkins, died. Her surviving husband, George B. Warren, was appointed executor, and during the course of settling the estate obtained an order to mortgage the real property in question to C. L. Preisker, one of the defendants. Subsequently Elmore Litten, as plaintiff, commenced this action to quiet title to the property, basing his right and title thereto on the deed quoted above. After a trial the court rendered judgment in favor of defendants, from which judgment this appeal is prosecuted.

It is the contention of plaintiff that by virtue of the conveyance from Ebenezer Hopkins to Sallie Hopkins he acquired either a vested or contingent remainder in that portion of the property conveyed to his mother, Mary Litten.

[1, 2] We believe an analysis of the conveyance fails to support the contention of appellant, but sustains the claim of respondents. The deed in clear and direct language "does grant, bargain, sell and convey unto the said party of the second part a life estate with remainder in fee to David Charles Hopkins and Mary Litten, nee Hopkins," the property in question. It is true that later in the deed the grantor attempted to state what the intention of the parties was, but the intention which it declared is so at variance with the plain unambiguous provisions of the deed that the two cannot be reconciled, and therefore the definite and positive provision of the deed must prevail. Where there is an asserted modifying or limiting clause in a deed, if such clause be of doubtful import, the fee contemplated by the granting clause of the deed will not be cut down. Cooper v. Selig, 48 Cal.App. 228, 191 P. 983.

[3] The conclusion that the title vested in David Charles Hopkins and Mary Litten is further supported by the accepted rule that favors the vesting of future interests as against the creating of contingent remainders, which are regarded with disfavor. Williams v. Williams, 73 Cal. 99, 14 P. 394; In re De Vries' Estate, 17 Cal. App. 184, 119 P. 109.

The instant case is somewhat analogous to the case of McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 79 P. 447, 1 L.R.A.(N.S.) 315, 104 Am.St.Rep. 84. In that case a life estate was granted, and then the deed provided, "it is the purpose of the party of the first part by this deed, that after the death of (life tenant) the * * * lands shall become and be the property of the Roman Catholic Girls Orphan Asylum." The court held that the orphanage was nowhere in the deed referred to as a grantee and the language used merely expressed the grantor's purposes in the future disposition of the property, requiring some future conveyance to effectuate the transfer. So here, no words of conveyance or grant are found to create an estate in Elmore Litten. The deed provides that at some future time upon the happening of some event, the remainder over shall go to Elmore Litten, provided a certain event comes to pass.

[4, 5] An attempt is also made to disqualify the trial judge on the ground that he had once had dealings as an attorney with the parties to the original deed and agreement, which was later received in evidence.

The only evidence that the trial judge had had any dealings with the parties was that in an agreement between Ebenezer Hopkins and Sallie Hopkins, dated May, 1908, and recorded in 1911, dealing with the conveyance of the property, the instrument was recorded at the request of N. B. Bigler. The trial in question occurred some twenty-two years later. There was no evidence that the trial judge, the Honorable N. B. Bigler, had any knowledge of the contents of said agreement nor that the parties had consulted him in regard thereto. This objection was not made, nor was the question called to the attention of the trial judge until upon a motion for a new trial. This instrument was introduced in evidence by appellant, and we must assume that he had knowledge of the fact that N. B. Bigler, an attorney, had caused said instrument to be placed on record. We cannot hold that a mere recording of an agreement, at the request of one who later became a judge of the superior court, is sufficient to disqualify unless it is made to appear by timely objection that the trial judge had knowledge of the contents of the instrument or had been attorney for either of the parties thereto.

Finding no error, the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

McNENY v. TOUCHSTONE et al.*

Civ. 10004.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1936.

Rehearing Denied Feb. 27, 1936.

1. Partnership ⇐311(1)

Under realty brokerage partnership dissolution agreement providing that upon consummation of prospective transactions by either partner, or by partner's employee or associate within two years after dissolution, each partner should receive percentage of commission "received by such parties hereto as may receive or be entitled to receive such commission," partner *held* entitled to receive percentage of commission received by copartner and not percentage of total commission received by copartner and associates in consummating transaction.

2. Partnership ⇐311(1)

Under realty brokerage partnership dissolution agreement providing for percentage of commission received upon consummation of prospective transactions within two years after dissolution, partner *held* not entitled to recover from copartner's subsequent associate upon theory that associate upon consummation of transaction received funds which belonged to partnership, since after dissolution nothing belonged to partnership as such, and rights of former partners were governed by agreement.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by W. L. McNeny against Weatherford W. Touchstone and another. From a judgment for plaintiff, defendants separately appeal.

Reversed.

James E. Neville, of Los Angeles, for appellant Blake Touchstone.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant Weatherford W. Touchstone.

Shaw & Bailey and Charles D. Shaw, all of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff had judgment against defendants in an action based upon a written agreement between plaintiff and defendant Weatherford Touchstone. Defendants appeal from said judgment.

Said agreement was made on October 1, 1931, for the purpose of dissolving the real estate brokerage partnership, known as McNeny and McNeny, theretofore existing between plaintiff and defendant Weatherford Touchstone. Defendant Blake Touchstone was not a member of said partnership and was not a party to said agreement.

Said agreement provided for the dissolution of the partnership as of October 1, 1931, for the sale of the furniture and good will to defendant Weatherford Touchstone, for the division of certain commissions then earned, and then followed paragraph 8, which is the paragraph upon which plaintiff bases his claims. Said paragraph reads as follows: "8. It is expressly agreed that the parties hereto, have prior to the date hereof, expended a great deal of time and effort in preliminary negotiations on the proposed transactions hereinafter referred to, and that said parties agree, that if and in the event, within two years from the date hereof, any of the following transactions are consummated, all commissions accruing therefrom, shall be distributed as hereinafter specified, when and as said commissions are paid. In so far as this agreement is concerned, a transaction shall be deemed to have been consummated when a prospective purchaser, seller, lessor or lessee has been produced who is ready, able and willing to and thereafter does consummate a transaction upon terms acceptable to the clients involved in said proposed transactions. The obligations to divide said commissions shall extend to transactions consummated by either of the parties hereto, directly or indirectly or by any person employed by or associated with either of said parties. (a) If a lease is obtained for the W. T. Grant Company on any location on Broadway between Third Street on the North and Tenth Street on the South, in Los Angeles, California, forty-five (45%) per cent of the gross commission received by such of the parties hereto as may receive or be entitled to receive such commission for obtaining said lease, shall be paid to the other when and as such commission is received. * * * (f) If a transaction is consummated for a hotel in Hollywood, San Diego, Fresno, Oakland, Bakersfield, Los Angeles, or San Francisco, in California, or Portland in Oregon, forty-five (45%) per cent of the gross commission received by such of the parties hereto as may receive or be entitled to receive such commission for negotiating said transactions, shall be paid to the other, when and as such commission is received."

There were six other subparagraphs of said paragraph 8, each relating to a different proposed transaction, and in each of said subparagraphs is the provision that a certain percentage of the commission "received by such of the parties hereto as may receive or be entitled to receive such commission * * * shall be paid to the other when and as such commission is received."

Upon the dissolution of said copartnership, defendant Weatherford Touchstone formed a partnership with defendant Blake Touchstone under the name of Touchstone and Touchstone. The partnership agreement between defendants did not cover any transaction mentioned in the above-quoted paragraph 8, but a separate agreement was entered into by defendants with reference thereto by way of a letter written by defendant Weatherford Touchstone and accepted by defendant Blake Touchstone. After setting forth the prospective deals enumerated in said paragraph 8 and excepting them from their general partnership agreement, the letter provided that: "In the event I uncover or am the procuring cause of a deal on any of the above, and should I ask your help and cooperation with reference thereto, and where there are no other brokers connected with the deal, you are to have one-third (⅓) of the commission, but where there are other brokers connected with the deal, you are to have one-sixth (⅙) of the commission." It further provided that if defendant Blake Touchstone should "uncover" one of said prospective deals or be "the procuring cause" and should ask the help and cooperation of defendant Weatherford Touchstone, the latter should receive one-third of the commission if there were no other brokers, and one-sixth thereof if there were other brokers connected with the deal.

Two deals mentioned in said paragraph 8 were consummated within the two years following the date of the agreement between plaintiff and defendant Weatherford Touchstone. In December, 1931, a lease was consummated for the W. T. Grant Company which was the prospective deal referred to in subparagraph (a) of said paragraph 8. In that transaction, defendant Weatherford Touchstone had associated the firm of Coldwell, Cornwall & Banker, and had also associated defendant Blake Touchstone. The total commission was $25,000, which was paid by the owners of the property by their three promissory notes as follows: To Coldwell, Cornwall and Banker, $12,500; to Weatherford Touchstone, $8,333.33; to Blake Touchstone, $4,666.67. In May, 1932, a transaction was consummated involving the Mayflower Hotel in Los Angeles, which was the prospective deal referred to in subparagraph (f) of said paragraph 8. The commission was $3,712.50. This deal was "uncovered" by defendant Blake Touchstone, and out of said commission the sum of $1,237.50 was received by defendant Weatherford Touchstone, and the sum of $2,475 was received by defendant Blake Touchstone.

A controversy arose over the amount of the commissions due to plaintiff upon the foregoing transactions under the provisions of said paragraph 8, and plaintiff commenced this action. The trial court concluded that plaintiff was entitled to judgment against both defendants for 45 per cent. of the total commissions received by both defendants, and entered its judgment accordingly. Separate appeals were taken by the two defendants.

[1] The parties agree that the principal question on this appeal concerns the construction placed on said paragraph 8. Appellants contend that the trial court misconstrued said paragraph 8 and erred in awarding judgment for any sum greater than 45 per cent. of the commission to which appellant Weatherford Touchstone was entitled. In our opinion this contention must be sustained. When said paragraph 8 is read in its entirety, we believe it to be free from ambiguity. It related to certain "proposed transactions" or "prospective deals." It expressly contemplated that other brokers might be "associated with either of said parties" in consummating said deals. In each of the subparagraphs fixing the percentages for particular transactions, it provided for the payment of a certain percentage of the commission "received by such parties hereto as may receive or be entitled to receive such commission." There was neither allegation nor proof that appellant Weatherford Touchstone received or was entitled to receive any greater commissions than those above specified upon said transactions. It was neither alleged nor proved that there was any fraud or bad faith in the association of other brokers in said transactions upon the terms above set forth. Such being the case, respondent's rights must be measured by the agreement and he was entitled to only 45 per cent. of the commissions which appellant Weatherford Touchstone received

or to which said appellant was entitled as a result of the consummation of said transactions.

[2] Furthermore, respondent was entitled to judgment only against appellant Weatherford Touchstone. Respondent attempts to justify the judgment against appellant Blake Touchstone upon the theory that said appellant had "received funds which plaintiff contends belonged to the partnership composed of plaintiff and defendant Weatherford W. Touchstone." This theory is untenable. Said partnership had been dissolved and the partners had adjusted and terminated their rights as partners by their agreement for dissolution. Thereafter, nothing belonged to the partnership as such, and the rights of the former partners were governed entirely by the terms of the said agreement for dissolution. Bennett v. Paulson (Cal.App.) 45 P.(2d) 369. As above indicated, respondent's rights under said agreement were limited to a portion of any commissions which might accrue to appellant Weatherford Touchstone, and the record discloses no basis for any judgment against defendant Blake Touchstone.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



11 Cal.App.2d 650

BROCKMAN v. ALDOUS et al.

Civ. 10684.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1936.

Rehearing Denied March 2, 1936.

Hearing Denied by Supreme Court April 6, 1936.

1. Negligence ⇐136(18)

In action by subcontractor's employee for injuries sustained when scaffold furnished by general contractors broke, whether scaffold was erected under supervision of defendant superintendent of general contractors *held* for jury.

2. Negligence ⇐136(18)

In action by subcontractor's employee for injuries sustained when scaffold furnished by general contractors broke, whether general contractors and their superintendent were negligent in construction of scaffold and in directing that it be used by subcontractor *held* for jury.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Cedric A. Brockman against Fred B. Aldous, etc., and others. From a judgment of nonsuit, plaintiff appeals.

Judgment reversed.

James V. Brewer, of Los Angeles, for appellant.

Joe Crider, Jr., E. H. Tilson and A. F. Mack, Jr., all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1, 2] This is an appeal by the plaintiff from a judgment of nonsuit. Defendants Aldous were general contractors in the construction of a building in Los Angeles, and defendant Knox was their general superintendent of construction. The plaintiff was an employee of the Cement Gun Construction Company. The general contractors sublet a contract to the Cement Gun Company to put a gunite finish on a certain outside wall of the building. The contract for this work was in writing, and provided for the furnishing of the necessary scaffolding by the general contractors. The scaffolds were built by the general contractors under the direction of their general superintendent, and were used in the first instance during the construction of the building. Thereafter they were furnished to the Cement Gun Company crew to do the gunite work. Plaintiff was a member of this crew, and, after plaintiff had worked two and one-quarter days on the scaffolds, one of them broke, causing plaintiff the injuries complained of. The plaintiff's contention in the trial court was that the defendant negligently furnished said scaffold and negligently directed its use by plaintiff. At the close of the plaintiff's case, the court granted a nonsuit as to defendant Knox on the ground that there was no evidence that he had anything to do with the construction of the scaffold and as to the general contractors on the ground that there was no substantial evidence of negligence on their part and no evidence that there was anything defective about the scaffold. The sole question necessary for us to determine is whether there is any

substantial evidence tending to support the above alleged facts.

Viewing the evidence in the light most favorable to plaintiff, the scaffold in question was 12 feet high, and was what is ordinarily known as a "jack horse," having two legs on one end and no legs on the other, and depending upon the weight of the platform and the persons on it to brace the end of its header against the building. The header was about 4½ feet long, made of 2-inch by 4-inch material. All other parts of the scaffold, including the 12-foot legs, were made of 1-inch by 6-inch boards. The braces and stays were made of the same 1-inch by 6-inch material. The plaintiff was working on this scaffold when one of its legs broke, the scaffold collapsed, and he fell to the ground. There was no unusual motion before the collapse of the scaffold. The foreman of the plaintiff's crew testified that Mr. Knox, the general superintendent of the defendants, told him that these scaffolds were for their use, and, when the foreman told him that they did not look so good, that they looked kind of flimsy, the superintendent said, "Well, we have been using them here for weeks and if they held us they should be good enough for your people." He also testified that one leg of the jack horse broke about six inches below the bottom of the side braces, that it broke at an angle of 45 degrees, split in two, broke straight through the wood from one flat surface to the other, and, when one leg broke, the platform in falling broke the other leg, and plaintiff was thrown to the ground.

One of the witnesses for plaintiff testified that he was a graduate of the California Institute of Technology and had studied structural engineering and was for six years building inspector and assistant city engineer of the city of Upland; that he had had experience with technical data, structural design, lumber, and strength of materials, including designing, supervision, and inspection, and as such had had experience with scaffolds, both in the supervision in making scaffolds and the inspection. He testified further that the scaffold as described by the witnesses with a load of 450 pounds distributed within 5 feet of the end of the scaffold would not be safe. In other words, that scaffold was not safe for the purpose for which it was furnished and for which it was directed to be used. Defendant Knox, called as a witness under section 2055 of the Code of Civil Procedure, testified that he was the superintendent in charge of this particular building; that the defendants were to furnish the scaffolds, and did furnish the scaffolds, for the work, and that he pointed them out to the foreman for the Cement Gun Company; that the scaffolds had been built about three weeks, and that they were built by the carpenters on the job under his direction; that he did not inspect the lumber after it was purchased. After reading the record in this case, we are satisfied that there was some substantial evidence tending to sustain the contentions that the scaffold was erected under the supervision of the defendant Knox; that the scaffold was defective; that the defendants were negligent in the construction of it, and negligent in directing that it be used for the gunite job. Under the circumstances, these questions were for the jury to decide, and the nonsuit should not have been granted.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



11 Cal.App.2d 537

LISLE v. RAGLE.

Civ. 1754.

District Court of Appeal, Fourth District, California.

Jan. 30, 1936

Executors and administrators ⇐453(2)

Judgment for daughter, who had sold property to mother, against mother's administrator for monthly installments that had become due up to time of trial and for balance to be paid in due course of the administration of estate as same became due under contract *held* proper as against contention that present complete payment with reduction by amount of legal interest should have been directed (Probate Code, § 953; Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Blanche E. Green Lisle against W. Orval Ragle, as administrator of the estate of Lottie L. Martin, deceased, formerly known as Lottie L. Green. From an adverse judgment, defendant appeals. On plaintiff's motion to dismiss appeal or affirm judgment.

Motion granted, and judgment affirmed.

See, also, 52 P.(2d) 608.

Lindsay & Gearhart, of Fresno, for appellant.

B. M. Benson, of Fresno, for respondent.

MARKS, Justice.

Plaintiff, who formerly was Blanche E. Green is the daughter of Lottie L. Martin, deceased, who was formerly Lottie L. Green. A. D. Green, the father and husband of the two, died, leaving them as his heirs. On September 2, 1926, the daughter and the mother entered into a written contract whereby the daughter sold her interest in the estate to her mother for $20,000, payable $500 cash, and the balance in installments of $125 per month, without interest. These payment were made up to and including the one due in January, 1934, and $10 was paid on account of the February installment.

Mrs. Martin died on March 22, 1934, and defendant was appointed and qualified as administrator of her estate.

On September 18, 1934, and within the time allowed by law, plaintiff filed her claim against the estate for the balance unpaid on the contract, both accrued and to accrue. Twenty days elapsed during which defendant failed to approve or reject the claim and plaintiff elected to treat it as rejected and filed this action on October 16, 1934. The trial court rendered judgment in favor of plaintiff for $1,750, which had accrued and become due on the contract up to the time of trial, and the further sum of $6,215, to be paid "in the due course of the administration of the estate" as the same becomes due under the contract. This judgment is brought before us on the judgment roll. After defendant's opening brief was filed, plaintiff moved to dismiss the appeal or affirm the judgment under the provisions of section 3 of rule V of Rules of the Supreme Court and District Courts of Appeal.

We have studied the opening brief of defendant and if we correctly understand his contentions, they may be summarized as follows: That there was $115 due and unpaid to plaintiff on her contract at the time of her mother's death; that giving judgment for the installments accruing and becoming due between the date of the death and trial was unauthorized as it was ordering the payment in the due course of the administration of the estate of the amount not due at the time of trial. The opening brief concludes as follows: "The respondent here, morally, is entitled to be paid the just amount which is coming to her, which should be the present worth of the amount unpaid on her contract at the time of her mother's death at the rate of seven per cent per annum, to be paid in the course of administration. We have no objection to the judgment being modified accordingly; otherwise, and if the respondent does not assent thereto, that the case be retried."

Counsel for defendant urge that the present judgment prefers plaintiff over other creditors, that it will delay closing the estate for four years, and that it is the duty of the plaintiff to consent to a reduction of the claim by the amount of legal interest. It should be observed that under the contract the payments are not to draw interest, and interest is not computed in the judgment.

These contentions are answered by the following provisions of section 953 of the Probate Code: "If there is any claim not due, * * * the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, * * * must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto. * * * If a creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered."

If the defendant desires to close the estate he can pay plaintiff the amount of those payments past due and deposit in court the amount of the future

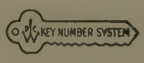
payments accruing under the contract. It is optional with a claimant whether he appear and assent "to a deduction therefrom of the legal interest for the time the claim has yet to run." No interest was allowed on future installments not due. We cannot assume that the estate is insolvent nor that if it should prove to be insolvent that the probate court will not order "a pro rata distribution" to plaintiff as well as to the other creditors.

A judgment on a claim not due was before the court in the case of Sime v. Hunter, 50 Cal.App. 629, 195 P. 935. A judgment in that case ordering the claim paid in due course of administration was affirmed on appeal. See, also, Pico v. De La Guerra, 18 Cal. 422, at page 429; Estate of Swain, 67 Cal. 637, 8 P. 497.

In our judgment the case is one in which there is no need for additional briefs or further argument, and to which the provisions of section 3 of rule V of the Rules of the Supreme Court and District Courts of Appeal is applicable.

The motion is granted, and the judgment is affirmed.

We concur: BARNARD, P.J.; JENNINGS, J.



11 Cal.App.2d 484

MALLMAN et al. v. KNEEBEN et al.

Civ. 10001.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1936.

Hearing Denied by Supreme Court March 26, 1936.

1. Taxation ⇐421(1)

Property assessed for taxes should be so described as to enable owner to know what land is charged with tax and also to enable possible purchaser to know what land is offered for sale (Pol.Code, § 3658a).

2. Taxation ⇐421(1)

In tax proceedings, description referring to page 86 of book of maps *held* adequate where complete map was on such page, though other matters relating to map were on page 87.

3. Taxation ⇐658(3)

Notice of tax sale in 1931 in form prescribed by statute then in effect *held* valid though not advising owner of rights conferred by new statute relating to period of redemption, but containing nothing regarding notice (Pol.Code, §§ 3764, 3817a).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Charlotte Mallman and others against Amy B. Kneeben and others, in which defendant El Cerrito Land Company filed a cross-complaint. From a judgment for defendants denying any of the relief asked, plaintiffs appeal.

Affirmed in part, and reversed in part.

J. B. Joujon-Roche, of Los Angeles, for appellants.

Swanwick, Donnelly & Proudfit and Tom W. Henderson, all of Los Angeles, for respondents.

SPENCE, Justice.

This was an action to quiet title to certain property in Los Angeles county which was described in the complaint as follows: "Lots 1, 5 and 6, block 6, Silver Strand Tract, as shown on book 7, page 86 of maps, Records of Los Angeles county, California, excepting a portion of said Lot 1 conveyed to the City of Venice, California. * * *" Thereafter followed the description of the portion of said lot 1 which was excepted. The prayer of the complaint also asked for an accounting, the appointment of a receiver, and other relief. Judgment was entered denying any of the relief asked in the prayer of the complaint, and plaintiffs have appealed.

Appellants have attacked numerous findings made by the trial court, but the entire controversy involves the question of the validity of certain tax deeds and the proceedings leading up to their issuance. Appellants' title to said real property was based upon said tax deeds. The determination of the validity of the proceedings relating to the portion of lot 1 described in the complaint gives rise to a question which is not involved in the determination of the validity of the proceedings relating to lots 5 and 6. We shall therefore first discuss the questions raised with respect to the lots last mentioned.

Without setting forth the descriptions of said lots 5 and 6 as found in the various proceedings leading up to the issuance of the tax deeds thereon, we may state that respondents' attack upon the sufficiency of said descriptions is based solely upon the manner in which reference was made therein to the recorded map. Respondents set forth the description used in the assessment books and elsewhere in these proceedings, and then concede that, "Ostensibly, this description of the property is adequate and in conformity with the requirements of section 3658a of the Political Code." But they point out that the reference to the map was "Silver Strand, as per Bk. 7, p. 86 of Maps, Records of L. A. Co.," while the evidence showed that the map, including descriptive matter, occupied all of page 86 and also a portion of page 87 of said book of maps. The truth of the matter is that the only portion thereof which is found on page 87 is the name "Silver Strand" together with certain printing referring to the owners, the place of recording of their deed, the name of the city, the date, the name of the engineer, and the scale. The map proper, which includes the lots in question, is found in its entirety on page 86.

[1,2] In our opinion, the above-mentioned reference to the recorded map was sufficient, and the trial court's findings and conclusions to the contrary may not be sustained. Respondents have cited us to no authority directly in point, and our search has disclosed none. It is of interest to note that various instruments through which respondents claimed their respective interests in the land made reference to the map in the same manner, giving the page number as 86, and making no reference to page 87. It is true, as stated in Miller v. Williams, 135 Cal. 183, 67 P. 788, 789, that: "A description which would suffice in an agreement to convey or in a deed may be bad in an assessment." But the true rule is indicated in that case where it is said: "The assessment is made with a view to a possible sale, and the property should therefore be so described as to enable the owner to know what land is charged with the tax, and also to enable a possible purchaser to know what land is offered for sale." There can be no doubt that the description given here with reference to the map was adequate to identify and locate the land with certainty. Both the owner and the prospective purchasers could readily know what land was charged with the tax and what land was offered for sale. The photostatic copy of the map book shows an obvious case of a slight overlap from page 86 to page 87, and no person of ordinary intelligence would have had the slightest difficulty in ascertaining that the map on page 86 was the map of "Silver Strand" as these words appeared on the portion overlapping on page 87. Respondents also cite and rely upon Stewart v. Atkinson, 96 Cal.App. 50, 273 P. 606, but the assessment there was of "one-half of lot 12," without describing which half of said lot was the subject of the assessment and sale. The court there said, 96 Cal.App. 50, on page 55, 273 P. 606, 608: "We think the description is void for uncertainty in that it cannot be ascertained from the description what half of the lot is attempted to be described." That case is obviously not in point.

[3] Respondents also contend that: "The 1931 notice of sale was invalid." It is here conceded by respondents that this notice was in the form prescribed by section 3764 of the Political Code, and was given in June, 1931, and prior to the sale by the state on July 1, 1931. Respondents call our attention, however, to section 3817a of the Political Code which went into effect on May 28, 1931, and contend that the notice of sale was invalid as it failed to advise the owner of the rights conferred by this section. We find no merit in this contention. The new section 3817a, as enacted in 1931 (St. 1931, p. 986, § 1), had nothing to do with the notice of sale, and the sections of the Political Code relating to such notice had not been amended prior to the sale. As the notice of sale complied with the sections relating thereto, we conclude that it was valid.

We shall now consider the situation with respect to the portion of lot 1 described in the complaint. In addition to the foregoing claims of invalidity as to all three lots, an entirely different claim of invalidity is urged as to said portion of lot 1. The evidence shows that on February 5, 1924, the owners conveyed a certain portion of said lot to the city of Venice. Thereafter, the assessor made no change in the description of the property assessed to the owners, but continued to assess the property as "lot 1" at the same valuation. The trial court found "that in 1924 and 1925 the attempted assessment was as to the whole of

said lot One without elimination of the portion conveyed to the City of Venice," and concluded that such attempted assessment was invalid. Appellants contend that the above-quoted finding is not supported by the evidence; but we find no merit in this contention. They rely on the presumption that the assessor properly performed his duty and assessed only the remaining portion of said lot 1. It is sufficient to point out that there was ample evidence to the contrary, which evidence sustained said finding.

The judgment is affirmed in so far as it affects the portion of lot 1 as described in the complaint. The judgment is reversed in so far as it affects lots 5 and 6 as described in the complaint. Appellants will recover their costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.



11 Cal.App.2d 653

WINANS v. ALPHA BETA FOOD MARKETS, Inc.

Civ. 1577.

District Court of Appeal, Fourth District, California.

Feb. 7, 1936.

Corporations ⇐133

Corporation *held* not liable for conversion of stock which it refused to transfer to plaintiff upon presentation of certificates signed by record owner thereof, where plaintiff was never owner of stock and had returned certificates to rightful owner, and had not demanded transfer from proper officer of corporation or furnished reasonable proof of right to transfer upon request (Civ.Code, §§ 327, 328).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by F. Winans against the Alpha Beta Food Markets, Inc. Judgment for defendant, and plaintiff appeals.

Affirmed.

Irvin C. Louis and H. B. Pool, both of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, by A. M. Bradley, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for conversion of certain capital stock in a corporation based upon the theory that the defendant converted certain shares of its own capital stock by refusing to complete a transfer of these shares as requested by the plaintiff who presented the certificates signed by the record owner thereof and demanded that they be transferred and new certificates issued in his name.

The complaint alleges that the plaintiff was the owner of 623 shares of stock in the defendant corporation; that he presented the certificates representing these shares to certain officers of the corporation and demanded that the same be transferred on the books and new certificates issued in his name; that the certificates had been indorsed to him by the record owner; that the defendant refused to transfer said shares; and that, as a result of such refusal, he has been damaged in the sum of $34,265.

A motion for a nonsuit was granted and judgment entered, and the plaintiff has appealed.

This appeal is entirely without merit, and any extended discussion of the points raised would serve no useful purpose. It appears from the appellant's own evidence that he was never the owner of the stock in question, that he had obtained possession of the certificates for the purpose of acting as the owner's agent and using them in a certain manner in attempting to secure the completion and closing of a pending escrow, and that the action of a third party, in withdrawing his papers from escrow, had made the completion of the deal impossible. Even if the respondent had transferred the stock, the appellant would not have been entitled thereto, and he makes no attempt to point out any possible way or manner in which he has been damaged or injured.

It further appears that the appellant did not demand a transfer of these certificates from the proper officer of the respondent, as required by section 327 of the Civil Code, and that the officer from whom he did demand a transfer required from him reasonable proof of his right to such trans-

fer, as authorized by section 328 of that Code, which proof was not furnished.

Finally, it appears from the appellant's own testimony that, after this transfer was refused, he returned the certificates in question to their rightful owner as a part of a full and complete settlement between them.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 525

SCHULTHEISS v. LOS ANGELES RY. CORPORATION.

Civ. 9034.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1936.

1. Carriers ⇐328(3), 331(5)

Where violation of ordinances making it unlawful to board moving street cars or ride on street car steps proximately contributes to passenger's injuries, passenger is guilty of negligence as matter of law.

2. Carriers ⇐345

In action for injuries sustained when passenger was attempting to board street car, ordinances making it unlawful to board moving street cars or ride on car steps *held* admissible, in view of uncontradicted testimony that street car was in motion when passenger attempted to board it.

3. Carriers ⇐1

Ordinances making it unlawful to board moving street cars or ride on car steps *held* not violative of constitutional provision vesting regulation of public utilities in Railroad Commission (Gen.Laws 1931, Act 6388, § 1; Const. art. 12, § 23).

4. Appeal and error ⇐999(1)

Where jury's verdict could have been based upon either of two theories, appellate courts would not look behind verdict to ascertain theory adopted by jury.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by William F. Schultheiss against the Los Angeles Railway Corporation. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

J. Edward Keating and Theodore E. Bowen, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

WHITE, Justice pro tem.

This is an appeal by the plaintiff from a judgment in favor of defendant made and entered on the verdict of a jury after trial, in which proceeding plaintiff sought to recover damages for personal injuries sustained by him through the alleged negligence of defendant in the management and operation of a street car which plaintiff was attempting to board near the intersection of Sixth and Spring streets in the city of Los Angeles.

The complaint alleged that plaintiff was invited by defendant to board one of its street cars, and that, while he was on the steps of the street car defendant negligently, recklessly, and without warning jerked and speeded up the street car, throwing plaintiff to the ground and injuring him.

Issue was joined through defendant's answer, which denied any negligence and pleaded contributory negligence on the part of plaintiff, in that he allegedly was negligent and careless in his attempt to board a moving street car.

Appellant assails the judgment on the single ground that the court erred in admitting into evidence over plaintiff's objection sections Nos. 36 and 37 of Ordinance No. 50515 of the city of Los Angeles, reading as follows:

"Sec. 36. Boarding Street Cars. It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion.

"Sec. 37. Riding on Car Steps. It shall be unlawful for any person to ride upon the fender or running board of any street car or vehicle."

[1, 2] With appellant's claim of error through the admission into evidence of said sections of the city ordinance we cannot agree. The rule in this state is clearly set forth in the case of Lorry v. Englander Drayage, etc., Co., 108 Cal.App. 116, 118, 291 P. 467, 468, where the court said:

"In the absence of the ordinance, the question of whether appellants were negligent in riding on the running board would depend upon whether a person of ordinary prudence would have so ridden under the circumstances then existing, and this would have been a question properly to be left to the jury. [Citing cases.] *But the ordinance enacted an absolute standard of conduct* and removed from the jury the right to speculate as to what that ideal composite the man of ordinary prudence might or might not have done under similar circumstances. *It thereby substituted certainty of conduct for uncertainty. If the violation of the ordinance proximately contributed to their injuries, appellants were guilty of negligence as a matter of law.*" (Italics ours.)

In view of the uncontradicted testimony that the street car was in motion at the time plaintiff attempted to board it, the ordinance was clearly admissible to show that by its violation plaintiff was guilty of contributory negligence. We find nothing in the cases cited by appellant at variance with the rule above set forth. Benjamin v. Noonan, 207 Cal. 279, 283, 277 P. 1045; Krause v. Rarity, 210 Cal. 644, 650, 293 P. 62, 77 A.L.R. 1327; Burtt v. Bank of California Nat. Ass'n, 211 Cal. 548, 551, 296 P. 68; Lindenbaum v. Barbour, 213 Cal. 277, 284, 285, 2 P.(2d) 161; Andreen v. Escondido Citrus Union, 93 Cal.App. 182, 187, 269 P. 556; Skaggs v. Wiley, 108 Cal.App. 429, 433, 292 P. 132; Clark v. Bowers, 116 Cal.App. 88, 92, 2 P.(2d) 486.

[3] Appellant attacks the right of the city of Los Angeles to regulate by ordinance the manner in which people may board or alight from street cars, and asserts that the ordinance is unconstitutional under the provisions of article 12, section 23 of the State Constitution. This claim is without merit, for the constitutional provision itself provides that the same shall not affect such powers of control over public utilities as relate to the making and enforcing of local police, sanitary, and other regulations, other than the fixing of rates. Therefore the city was entirely within its rights when by ordinance it sought to control, supervise, and regulate the relations between a public utility and the general public in a matter concerning the convenience and safety of the public, such as the manner of boarding and alighting from street cars. California Const., art. 12 § 23; Deering's Gen. Laws 1931, Act 6388 § 1; Switzler v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 138, 155, 285 P. 918.

[4] It might also be here observed that a reading of the transcript of the evidence in this case clearly shows that the verdict of the jury herein could as well have been based upon a total lack of negligence on the part of respondent as upon contributory negligence upon the part of the appellant through a violation of the ordinance in question. In such a situation appellate courts will not look behind the verdict in an attempt to ascertain the theory adopted by the jury.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 498

SOUTHERN GLASS CO. v. DAIRY SERVICE CO., Ltd., et al.

Civ. 9539.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1936.

1. Principal and agent ⇐133

Where person deals with agent with knowledge of disclosed principal or with knowledge of existence of agency and exclusive credit is given to agent, recovery of judgment is limited to agent.

2. Corporations ⇐325

If corporation lacked express charter authority to conduct certain business, in absence of statute expressly forbidding such business, no liability resulted to stockholders because corporation conducted such business.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Southern Glass Company against Dairy Service Company, Ltd., and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

John O. Bender, of Los Angeles, for appellant.

Benj. S. Parks, of Los Angeles, for respondent Beverly Dairies, Ltd.

A. D. Orme, of Pasadena, for other respondents.

HOUSER, Presiding Justice.

As far as are necessary to a consideration of the decisive questions presented on this appeal, in substance it appears that one Dave Marx, who was operating a business under the fictitious name of Dairy Service Co., had been engaged in the business of supplying trade-marked milk bottles to several different dairies; that with some variations in the price, dependent upon size of container and fluctuating market conditions, as a general proposition, at the outset Marx bought such bottles from the plaintiff at a price of about 5½ cents per bottle, and distributed them to dairies at a price (or rental) of 4½ cents per bottle. As bottles became lost and were collected by other dairies, eventually they were sent to, or received by, a bottle exchange, from which establishment they were recovered by Marx, who paid to such bottle exchange 3 cents per bottle. Thereupon, at the original price or rental of 4½ cents per bottle, he again delivered the bottles to his respective customers—from which course of transactions he expected to realize a profit. His business having increased to considerable proportions, Marx, together with some, but not all, of his customers, formed a corporation that was known and designated by a name identical with that theretofore used by Marx as a fictitious business name, excepting that the abbreviation "Ltd." was added thereto, and the corporate name thus became "Dairy Service Co., Ltd." From approximately the commencement of the transaction of business under the fictitious name of Dairy Service Co., Marx became indebted to the plaintiff; and after the organization of the corporation, the indebtedness which theretofore had been incurred by Marx was so largely increased as against the corporation, or possibly against "Dairy Service Co.," that in order to insure its payment a promissory note secured by a chattel mortgage on the business and equipment of the corporation was executed and delivered by it to the plaintiff. Thereafter, on the failure by the corporation to pay the note when it became due, the plaintiff instituted a suit against the corporation on said note, in which suit a prayer was included for the foreclosure of the chattel mortgage, and which suit resulted in a recovery by the plaintiff of a judgment against said corporation. In execution of the judgment, on foreclosure sale, the plaintiff bought the business and equipment of the corporation for less than the amount of the judgment and thereupon became entitled to a deficiency judgment for the difference between the amount of the original judgment and the amount for which the property of the corporation was sold on foreclosure sale thereof. Thereupon, on the theory that the stockholders of the corporation and all its customers constituted but an association of persons both before and after the incorporation of Dairy Service Co., Ltd., of which at all times in question Dave Marx was the managing agent, the plaintiff instituted the instant action to recover against all such persons a judgment for the unpaid balance on the account which theretofore had existed between the plaintiff and Dairy Service Co. and Dairy Service Co., Ltd. Based on substantial evidence, the trial court found as facts that no association, as such, had ever existed; that at all times in question, the plaintiff had had full knowledge of the facts regarding the relationship that existed among the several parties, including the plan and mode of operation of the business originally conducted by Marx under the fictitious name of Dairy Service Co., and later by the corporation known as Dairy Service Co., Ltd.; and that after a full investigation by the plaintiff of the credit standing both of Marx and Dairy Service Co., Ltd., had extended credit in its several transactions with the interested parties solely and exclusively first to Marx and later to the corporation, Dairy Service Co., Ltd., although at all times the account was carried under the fictitious name of Dairy Service Co. In such circumstances, judgment was rendered in favor of the defendants, and it is from that judgment that the instant appeal has been taken.

[1] It is well-settled law that where a person has dealt with an agent with full knowledge of the name and the existence of a disclosed principal, or where the facts justify the conclusion that the person who has dealt with the agent did so with knowledge of the existence of such agency, and thereupon, in any transaction that may have occurred between the interested parties, exclusive credit was given to the

agent instead of to the principal, the recovery of a judgment, if any, based upon any such transaction (to which recovery the person who dealt with the agent may have become entitled), will be limited to the agent. Weaver v. Atlantian Construction Co., 84 Cal.App. 154, 258 P. 111; Geary Street, etc., R. Co. v. Rolph, 189 Cal. 59, 207 P. 539; McDevitt v. Chas. Corriea & Bros., 70 Cal.App. 245, 233 P. 381; Ewing v. Hayward, 50 Cal.App. 708, 195 P. 970.

In the face of the evidence and the findings of fact made by the trial court, which findings were amply supported by the evidence, it becomes manifest that the judgment should be affirmed. But the appellant urges the point that because (as it asserts) the articles of incorporation of Dairy Service Co., Ltd., failed to expressly authorize it to engage in the business of selling or "renting" milk bottles, all the stockholders of the corporation became personally liable for the debt which was incurred by such corporation in that regard. It may be conceded that in special circumstances, as for example, where a corporation engages in a business which by statute it is expressly forbidden to transact, a resultant liability on the part of its stockholders may ensue. In the instant case, the evidence indicates neither any such situation, nor anything akin to it. Besides, the appellant fails to point out either with exactness, or at all, in what respect the powers of the corporation, as outlined in its articles of incorporation, were lacking with reference to the transaction of a business of the nature of that in which it was engaged. Indeed, the broad and general language employed in its articles of incorporation in describing or specifying its powers would seem clearly to include not only the particular business indicated by its corporate name, but as well "To conduct business, have one or more offices, and purchase, mortgage, lease, hold and convey real and personal property or any asset or interest therein in any part of the world, * * *" In addition thereto, the corporation was authorized "To make and perform contracts of any kind and description and in carrying on its business or for the purpose of attaining or furthering any of its objects; to do any and all things which a partnership or a natural person could do and exercise and which now or hereafter may be authorized by law."

[2] But even if technically the corporation might be considered lacking in express charter authority to conduct the business of selling or "renting" milk bottles, in the absence of any prohibitory statute by which the corporation was expressly forbidden to engage in business activities of the nature of that which here is the subject of inquiry, no liability would result to the stockholders of the corporation by reason of the fact that, in the respect suggested by the appellant, it had exceeded its corporate powers. That such is the general rule is attested by the decision in the case of Tennessee Automatic Lighting Co. v. Massey (Tenn.Ch.App.) 56 S. W. 35, 37, wherein in part it was said: "As to the first position, if the hotel company was properly incorporated, its subsequently engaging in a business foreign to its charter duties would not render invalid the previous incorporation, though it might be ground for forfeiture at the suit of the state. Nor would the doing of ultra vires acts by a corporation render the members of the corporation personally liable for such acts. Searight v. Payne, 2 Tenn.Ch. 175, 178, 181. If such liability existed, it would be a perilous thing to hold stock in any corporation. Persons who deal with corporations must take notice of their powers (Elevator Co. v. Memphis & C. R. Co., 85 Tenn. 703, 705, 5 S.W. 52 [4 Am.St.Rep. 798]), and if they make a mistake, and enter into ultra vires contracts with corporations, they cannot call upon the stockholders to make good such contracts out of their private estates." See, also, vol. 6, Thompson on Corporations, p. 664.

Since all other questions presented on the appeal are dependent upon a decision in favor of the appellant on the questions to which attention hereinbefore has been directed, it follows that such additional questions are unnecessary of consideration.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.

11 Cal.App.2d 567

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. HOWLAND et al.

Civ. 9317.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1936.

1. Pleading ⊂=403(3)

In foreclosure action against administrator of estate of owner of mortgaged premises who had guaranteed mortgage debt, any defect in complaint which did not contain copy of claim presented to administrator was supplied by answer which contained exact copy thereof.

2. Action ⊂=50(8)

Action for deficiency judgment against administrator of estate of owner of mortgaged premises who had guaranteed the mortgage debt was properly joined with cause of action to foreclose mortgage (Code Civ.Proc. § 427, subsec. 8).

3. Guaranty ⊂=16(4)

Extension of time for payment of mortgage until certain date so long as interest was paid on note in quarterly installments was consideration for guaranty of mortgage debt by owner of mortgaged premises and suit was properly brought by mortgagee when interest installment was in default (Civ.Code, § 1605).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by the Security-First National Bank of Los Angeles against J. W. Howland and Wallace M. Pence, as administrator with the will annexed of the estate of Omar M. Pence, also known as O. M. Pence, deceased, and others. From an adverse judgment, Wallace M. Pence appeals.

Affirmed.

Wallace M. Pence, in pro. per.

Maurice Blumenthal, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent entered after the trial judge granted a motion for judgment on the pleadings.

The conceded facts are:

March 10, 1930, defendants J. W. and Francis Irene Howland deeded certain premises to Omar M. Pence, subject to a mortgage executed by said defendants in favor of respondent securing the payment of a note due November 7, 1931. September 25, 1930, Omar M. Pence requested respondent to grant an extension of the due date of said note to November 7, 1934, which request was granted by respondent, and in consideration thereof said Omar M. Pence guaranteed payment of the note. March 7, 1932, Omar M. Pence died. Respondent duly presented a claim to the administrator of decedent's estate based upon the note and guarantee above mentioned, which claim was rejected. Respondent thereafter instituted this action to foreclose the mortgage and joined appellant as administrator of the estate of Omar M. Pence, deceased. A judgment was entered decreeing foreclosure of the mortgage and providing that a deficiency judgment be entered against appellant.

Appellant relies for reversal of the portion of the decree providing for a deficiency judgment against the estate on the following propositions:

First: That the complaint does not contain a copy of the claim presented to appellant.

Second: That an action to establish the validity of a claim against an estate based upon a note, the payment of which was guaranteed by the decedent, may not be joined with a cause of action to foreclose a mortgage securing said note.

Third: The consideration for the guarantee has failed.

[1] The first proposition urged by appellant must be answered adversely to his contention, since the answer contained an exact copy of the claim as presented to the administrator of the estate, thus supplying any defect in the complaint relative to the contents of the claim as filed with the administrator of decedent's estate. Burns v. Cushing, 96 Cal. 669, 671, 31 P. 1124.

[2] The second proposition presented by appellant is answered contrary to his position by subsection 8 of section 427, Code of Civil Procedure, which provides that the plaintiff may unite several causes of action in the same complaint, where the claims arise out of transactions connected with the same subject of action. In the instant case there can be no doubt that the causes of action to foreclose the mortgage and for a deficiency judgment against appellant were claims arising out of transactions connected with the same subject of

action, to wit, the promissory note which was secured by the mortgage sought to be foreclosed and the payment of which was guaranteed by the decedent.

[3] The final proposition upon which appellant relies is without merit for the reason that the consideration for the guarantee was respondent's promise to forbear suit for collection of the note prior to November 7, 1934, so long as the interest was paid on the note in quarterly installments when due. Section 1605, Civ.Code; Papadakos v. Soares, 177 Cal. 411, 413, 170 P. 1114. This promise respondent complied with. As the installment of interest due on the note November 7, 1932, was not paid, respondent very properly brought this action to enforce payment of the obligation.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 503

RICHTER v. NEILSON.

Civ. 9701.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1936.

Hearing Denied by Supreme Court March 30, 1936.

1. Malicious prosecution ⇐16

Action for malicious prosecution may be maintained only when it is shown that prosecution was actuated by malice and party instigating it had no reasonable ground for causing prosecution.

2. Malicious prosecution ⇐27

Characteristics of mere "negligence" are inadvertence or absence of intent to injure, whereas to constitute "malice," essential to maintenance of malicious prosecution action, there must have been motive or purpose and it must have been an improper one.

[Ed. Note.—For other definitions of "Malice" and "Negligence," see Words & Phrases.]

3. Malicious prosecution ⇐15

Want of probable cause is essential element of action for malicious prosecution.

4. Malicious prosecution ⇐56

In action for malicious prosecution, burden is on plaintiff to prove both malice and want of probable cause.

5. Malicious prosecution ⇐22

If prosecuting witness acts in good faith and fairly discloses to prosecuting attorney all facts within his knowledge regarding offense, and is advised that probable cause for arrest exists, witness is exonerated from liability for malicious prosecution, even though attorney's advice was erroneous.

6. Malicious prosecution ⇐55

In action for malicious prosecution, defense that prosecuting witness relied on advice of prosecuting attorney to whom all facts were fully disclosed may be interposed and proved under general issue.

7. Malicious prosecution ⇐64(2)

Evidence *held* insufficient to establish case of malicious prosecution against owner who instituted grand theft prosecution against contractor who failed to pay bills and who could not be located, where record revealed no facts disclosing malice, and, in causing arrest, owner acted on advice of deputy district attorney and in honest belief that offense had been committed.

8. Malicious prosecution ⇐71(2)

In action for malicious prosecution, where there is no substantial conflict in evidence, question of what facts amount to probable cause is one of law.

9. Malicious prosecution ⇐32

In action for malicious prosecution, presumption of malice does not arise from want of probable cause.

10. Malicious prosecution ⇐20

Probable cause in instituting prosecution alleged to be malicious does not depend on actual facts but upon honest and reasonable belief of party prosecuting.

11. Malicious prosecution ⇐22

Owner trying in vain for three weeks to locate contractor who had not paid bills was not required to have consulted private attorney before laying matter before prosecuting authorities and in instituting prosecution alleged to have been malicious.

12. Malicious prosecution ⇐18(7)

Prosecuting witness need not, to avoid charge of malicious prosecution, institute investigation of crime itself or seek to ascertain existence of other facts relating to offense or to find out whether accused has defense.

13. Malicious prosecution ⇐64(2)

Where owner instituted prosecution for grand theft on ground that contractor did not use certain payment to pay bills, owner's refusal, after being informed that contractor had actually used such payment to pay bills

against job, to "drop" prosecution unless contractor paid balance of outstanding bills *held* not evidence of malice.

14. Malicious prosecution ⇐27

Transactions occurring subsequent to commencement of criminal proceedings are not to be considered in determining question of malice.

15. Malicious prosecution ⇐60(1)

In action for malicious prosecution, testimony regarding nature of advice defendant received from city treasurer, who had been chief of detective bureau of municipal police department, before going to district attorney's office *held* admissible on question of malice.

16. Malicious prosecution ⇐59(1), 60(1)

In action for malicious prosecution, defendant is entitled to introduce any competent evidence to show that he had reasonable cause for instituting proceeding, or that, even if he did not have such cause, he was not actuated by malice.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Ernest Richter against Irene A. Neilson. Judgment for plaintiff, and defendant appeals.

Reversed.

Roland Becsey, of San Francisco, for appellant.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Ernest Richter, sued the defendant, Mrs. Irene A. Neilson, for malicious prosecution, and upon trial before the court, sitting without a jury, was given judgment for damages in the sum of $1,150, from which judgment defendant appeals. The action grew out of plaintiff's arrest on a grand theft charge filed against him on May 6, 1932, by the defendant after consultation with a deputy district attorney who drew the criminal complaint and authorized the issuance of the warrant of arrest. The specific charge made against plaintiff was that he unlawfully took $265 of the personal property of Mrs. Neilson. He was arrested on May 12, 1932, and after being imprisoned for an hour was released on bail. His preliminary examination began shortly after his arrest, but was continued some ten times, and on August 9, 1932, the magistrate dismissed the case upon the ground of insufficiency of evidence. Approximately six months later plaintiff brought the present action. As grounds for reversal defendant contends that the evidence is legally insufficient to support the findings or judgment, and that the trial court erred in excluding certain testimony offered by her refutation of the charge of malice. In our opinion, each contention so made by defendant must be sustained.

[1] With respect to the law governing the case, it has been repeatedly declared by the courts of this state that actions for malicious prosecution have never been favored in the law; and while they have been readily upheld when the proper elements thereof have been established, they are sustained only when it is shown that the prosecution was in fact actuated by malice and the party instigating the same had no reasonable ground for causing the prosecution. Considerations of public policy are given as the reasons for so holding; it being said in this regard that it is for the best interests of society that any person who has good reason to believe the law has been violated shall have the right to cause the arrest of the offender, and consequently for his protection in so doing it is the established rule that if he has reasonable ground for his belief, and acts thereon in good faith, he shall not be mulcted in damages merely because the accused is able at the trial to establish that no crime was committed or that he is innocent. Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am.St.Rep. 174; Lacey v. Porter, 103 Cal. 597, 37 P. 635; Haydel v. Morton (Cal.App.) 48 P.(2d) 709, and cases cited therein; Dunlap v. New Zealand F. & M. I. Co., 109 Cal. 365, 42 P. 29. Malice, therefore, being the chief element of a cause of action for malicious prosecution, the authorities held unanimously that no such action may be maintained unless the plaintiff establishes that the defendant in instituting the criminal proceeding was actuated in his conduct by some improper or sinister motive. 16 Cal.Jur. 735. In emphasizing the indispensability of such element, the court in Griswold v. Griswold, 143 Cal. 617, 77 P. 672, 673, quoted the following: "As said by Chief Justice Redfield in Barron v. Mason, 31 Vt. [189] 197: 'For it is found, in almost

every book upon the subject, that if defendant, however causelessly, did really act in good faith and without malice in preferring the charge, he cannot be made liable for a malicious prosecution.'"

[2] Furthermore, it is well settled that the element of malice thus required to be established must be actual malice (16 Cal. Jur. 735), which, as pointed out in Jenkins v. Gilligan, 131 Iowa, 176, 108 N.W. 237, 9 L.R.A.(N.S.) 1087, is vastly different from mere negligence. As there stated, the characteristics of mere negligence are inadvertence or absence of intent to injure; whereas to constitute malice there must have been a motive or purpose, and it must have been an improper one. As there stated also, the malice requisite to a cause of action for malicious prosecution is not the same thing as the failure to act as a reasonable person would under the circumstances. True, the rule does not require a plaintiff to show that the prosecution was impelled by personal hostility, a grudge, or ill will; but there must be evidence importing bad faith or want of sincere belief that the facts and circumstances justify the prosecution; and the malice must refer to the mind and judgment of the prosecutor in the exercise of the particular act charged as a malicious prosecution. Griswold v. Griswold, supra; Fleischhauer v. Fabens, 8 Cal.App. 30, 96 P. 17.

[3, 4] Want of probable cause is another essential element of an action of this kind. Haydel v. Morton, supra. But whether or not a want of probable cause is shown, malice must be affirmatively established; and it is not sufficient to show merely that the criminal proceedings complained of were initiated without proper ground or even without what in law constitutes probable cause. 16 Cal.Jur. 735; 18 R.C.L. 28. In other words, there must be a concurrence of malice and want of probable cause; and the burden is always on the plaintiff to prove both. Griswold v. Griswold, supra; Haydel v. Morton, supra. Even though it be found, therefore, that the facts within the knowledge of the person making the criminal charge do not in point of law constitute a crime, if they are of such character as to induce in the mind of a reasonable person the honest belief that a crime has been committed and the accuser is not actuated by improper motives, he is not subject to damages for having caused the arrest. Dunlap v. New Zealand F. & M. I. Co., supra; 16 Cal. Jur. 741.

[5, 6] Moreover, it has long since been the law that if in addition to his own belief a defendant proves that before commencing the prosecution of the action alleged to be malicious he sought the legal advice of an officer selected by the people to prosecute offenders against laws and in good faith fully and fairly disclosed to that officer all of the information he possessed and was then advised that a crime had been committed, and the prosecution is based upon a complaint prepared by that officer, he has made out a complete defense to the action (Dunlap v. New Zealand F. & M. I. Co., supra; 16 Cal. Jur. 741 and cases cited under note 12; Ball v. Rawles, supra; Hahn v. Schmidt, 64 Cal. 284, 30 P. 818), however erroneous the advice may have been (Potter v. Seale, 8 Cal. 217, 218, 226; 18 R.C.L. 45); and such defense may be interposed and proved under the general issue. Levy v. Brannan, 39 Cal. 485; 16 Cal.Jur. 746.

In the present case the circumstances leading up to plaintiff's arrest were as follows: In October, 1931, he entered into a verbal contract with Mrs. Neilson and her sister to install a heating plant and certain plumbing in an apartment house recently acquired by them on Jackson street in San Francisco, and to furnish all materials and labor necessary to complete the job. The agreed contract price was $865, but before the work was started plaintiff raised the price to $950, claiming that the cost of materials had advanced; and before the job was finished certain repair work was done and two radiators were installed, which plaintiff claimed were not included in the contract price. The cost of the former was $58 and the latter $120.

Before the work was begun nothing was said as to how or when the contract price should be paid, but during the progress of the work plaintiff demanded and received three payments, aggregating $665, claiming that such payments were necessary to finance the job and pay materialmen. One payment was for the sum of $265. It was made on April 4, 1932, and was afterwards selected by the deputy district attorney as the basis for the criminal charge. Mrs. Neilson claimed that at the time plaintiff demanded said payment he represented that it was necessary for him to have the money to pay the account of the Kewanee Boiler Company, which had fur-

nished much of the material; that if such payment were made he would be able to obtain a discount and preserve his credit, and that later he would produce the receipted bills to show that the money had been so applied. The work was practically completed on April 8, 1932, at which time plaintiff took away most of his tools and materials. On that day also he demanded and was paid an additional $100, leaving a balance due of $185 on the agreed contract price of $950. About a week later Mrs. Neilson requested him to do a few other small jobs and he promised to attend to the matter the next morning. He failed to appear, however, and within the next few days, after trying to reach him by phone, Mrs. Neilson went to his shop and found it vacant. She was informed by a man in charge there that a day or two previously plaintiff had removed or disposed of his equipment and left town. Shortly thereafter several materialmen called on Mrs. Neilson, and, after inquiring as to plaintiff's whereabouts, demanded payment of the balance due on their accounts, and threatened to file liens against the premises at once unless the accounts were paid. One was the representative of said boiler company, who informed Mrs. Neilson that only $100 had been paid on its account and that there was still due approximately $265. Being thus threatened with the filing of liens and being unable to get in touch with plaintiff otherwise, Mrs. Neilson, who is referred to in the briefs as an elderly person, wrote him a letter, dated April 24, 1932, which plaintiff admits having received and ignored, stating that the heating plant was working satisfactorily, but that she wanted him to call and do some more work; and on the following day, believing that plaintiff had perpetrated a fraud upon her and fled, she and her sister sought the counsel of Duncan Matheson, treasurer of San Francisco, who was an old family friend and for many years had been chief of the detective bureau of the San Francisco police department. After conferring with him, she and her sister went to the detective bureau and were escorted by a member thereof to the office of the deputy district attorney having charge of the bond and warrant department, to whom, in answer to his questions, she related the facts of the case. She informed him how plaintiff had collected the money and not paid the bills; of the circumstances of his disappearance and her unsuccessful efforts to locate him. She also produced the canceled checks showing the payments she had made; whereupon the deputy asked whether at the time plaintiff demanded any particular payment he made any representations or promises as to whether the money would be used to pay bills against the job; and if so to designate the check representing such payment. In response Mrs. Neilson handed him the check for $265 and related what she claimed plaintiff had said when he asked for that payment. The deputy thereupon selected that particular payment as the basis of the criminal charge and drafted the complaint accordingly. He requested, however, that she withhold filing the same for a few days in the hope that plaintiff might return and adjust matters. Complying with such request, Mrs. Neilson took no action in the matter for approximately two weeks, but continued her efforts to locate plaintiff. Meanwhile, materialmen and laborers repeated their threats to place liens against the place, and finally, on May 6, 1932, she swore to the criminal complaint, immediately following which liens amounting to $400 were filed against the property; and a week later plaintiff was placed under arrest.

Shortly after the arrest was made it was disclosed that a day or two after having received the check for $265 plaintiff applied the proceeds of that particular check to the partial payment of various bills against the job, $100 of which was paid on the account of said boiler company; moreover, he denied having made any representations or promises whatever at the time he demanded the current payments. He admits, however, that with the exception of the items of extra repair work and the two radiators, he agreed to pay for all materials and labor necessary to complete the job, and that he did not do so. Furthermore, he admits that shortly after taking away his tools and materials he closed his shop in San Francisco and went to Sacramento. His explanation therefor was that he went there to look for another job. He claimed, however, that he returned to San Francisco every week-end, and that on each of those week-ends he called at defendant's premises to see whether the heating plant was operating satisfactorily and to get the rest of his tools and materials, at which time, so he testified, he inquired for defendant, but did not find her in. He also admits that about the time he disposed of his business in San Francisco he changed his San Francisco residence address; an

that not until after his arrest did he make any request for the payment of the unpaid balance on the contract price. The deputy district attorney was called as a witness for defendant, but his memory as to the exact conversation which took place at the conference between him and Mrs. Neilson was not clear. According to his recollection, Mrs. Neilson told him that plaintiff agreed to pay all bills; that after the work was finished she "sought information as to the payment of the bills, and found liens going on, and when she looked him up she couldn't find him, that his former place of business was vacant, and moreover he actually had left." Continuing, he testified: "If you want my conclusion it was he had skipped, and on that I thought there was probable cause and issued the warrant." In her own behalf Mrs. Neilson testified among other things that after having consulted with the deputy district attorney it was her honest belief that plaintiff was guilty of the offense charged against him and that when she swore to the complaint she was not actuated by any malice whatever, but was prompted to do so only by the honest belief that the charge she was making was well founded.

[7] Measured by the legal standards hereinabove set forth, the evidence, in our opinion, is legally insufficient to establish a case of malicious prosecution, first, for the reason that the record reveals no direct evidence to prove that the defendant was actuated by any malicious motives, nor in our opinion were any circumstances proved from which an inference of malice may be reasonably inferred; and, secondly, it affirmatively appears that in causing plaintiff's arrest defendant acted under the advice of the deputy district attorney and in the honest belief that plaintiff had committed the offense with which he was charged.

[8-10] Plaintiff argues that there was a want of probable cause, and that malice may be inferred therefrom. We find no merit in the point. The rule is that where there is no substantial conflict in the evidence the question of what facts and circumstances amount to probable cause is one of law (Booraem v. Potter Hotel Co., 154 Cal. 99, 97 P. 65; Holliday v. Holliday, 123 Cal. 26, 55 P. 703; Ball v. Rawles, supra; Moore v. Durrer, 127 Cal.App. 759, 16 P.(2d) 676; Haydel v. Morton, supra); and that no presumption of malice arises from a want of probable cause. Griswold v. Griswold, supra. Moreover, probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting; and the question of whether there was probable cause must be determined from the facts as they existed and appeared to the party prosecuting at the time he preferred the charge. Harkrader v. Moore, 44 Cal. 144; Griswold v. Griswold, supra. Conceding, therefore, that the facts surrounding this particular payment of $265, as they were disclosed after plaintiff's arrest and at the preliminary examination, failed in point of law to establish the commission of a crime, it does not follow therefrom as a matter of law that the situation existing and as it appeared to defendant at the time she swore to the complaint, which was brought about mainly by plaintiff's own peculiar conduct, would not induce in the mind of a reasonably prudent person the honest belief that a crime had been committed. Dunlap v. New Zealand F. & M. I. Co., supra. As said in substance in Jones v. Jones, 71 Cal. 89, 11 P. 817, where a person so surrounds a transaction with circumstances of his own creation, real or adventitious, indicating that he is guilty of an unlawful act, he should not be heard afterwards to complain that others acted upon the hypothesis thus supported by his conduct. In any event, and entirely aside from the question of whether the circumstances themselves were legally sufficient to constitute probable cause, the defendant was entitled to the benefit of the rule that where one, before instituting the prosecution, has in good faith consulted an attorney at law in good standing, particularly if such attorney be one charged with the prosecution of public offenses, and has stated to him all the facts of the case, and has been thereupon advised by such attorney that a prosecution will lie, and such person has acted honestly on that advice, this of itself constitutes probable cause. Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; Jirku v. Brod, 42 Cal.App. 796, 184 P. 413; Baranger & Co. v. Meyer, Cahn & Talbott, 34 Cal.App. 158, 166 P. 862; Dunlap v. New Zealand F. & M. I. Co., supra.

Plaintiff asserts, however, that the defendant made certain false statements to the deputy district attorney, which shows a malicious motive and excludes the defense of "advice of counsel." These assertions, in our opinion, are based either upon a misinterpretation of the evidence or upon the-

ories unsupported thereby. For example, the principal one relied on is founded on the false assumption that the defendant knew at the time she consulted the deputy district attorney that plaintiff had applied all of the proceeds of the $265 check to the payment of bills against the job, and that she failed to reveal such knowledge to said deputy. It is true, the testimony shows that she knew before filing the complaint that plaintiff had paid $100 on the boiler company's account and $25 on the account of the mechanic who constructed the chimney, but it also shows that she had no knowledge whatever that the proceeds of this particular check for $265 had been applied to the payment of the two accounts above mentioned or to the payment of any other bills against the job; and at the time she was informed of the partial payments on the two accounts mentioned she was also told that there were still large sums due on those accounts; and besides at the same time a number of other creditors were clamoring for their money and threatening to file liens against the job. Nor did the deputy district attorney testify, as plaintiff implies, that if defendant had told him the truth no warrant of arrest would have been issued. On cross-examination by plaintiff's counsel and in answer to a hypothetical question which the witness repeatedly declared did not correctly state the facts, he replied simply that if a contractor received $265 on a completed contract "and actually paid it for material and labor used" in performing the contract, no criminal offense, in his opinion, would be committed. Nor did said deputy testify, as plaintiff implies, that the defendant told him that plaintiff had left town without completing his contract or that liens had already been filed against the premises, or that "none of the $265 had been used to pay the bills." His testimony on these points was that she told him that plaintiff "was going to pay the bills and had not paid the bills," and that after he had been paid the $265 she "sought information as to the payment of the bills, and found liens going on, and when she looked him up she couldn't find him." Contrary to plaintiff's assertions also, the record shows that defendant did make inquiry to ascertain whether plaintiff had paid the bills. Admittedly a number of creditors called on her and demanded the money due them; and obviously the only person from whom she might obtain the information as to who the remaining creditors were and whether they had been paid was plaintiff; and as shown, after a fruitless search for more than three weeks she was unable to locate him. To all appearances he had absconded. The record also discloses, contrary to plaintiff's contention, that defendant correctly informed said deputy as to the amounts of the several current payments made on the contract price, from which it was self-evident that when plaintiff disappeared he had not collected the full amount of the contract price. The remaining specifications of alleged false statements have already been disposed of.

[11] Nor was it incumbent upon defendant, as plaintiff argues, to consult a private attorney before laying the matter before the district attorney's office. Dunlap v. New Zealand F. & M. I. Co., supra. After having tried in vain for three weeks to locate him and having good reason to believe from what had transpired during his absence that she had been defrauded, she was doubtless warranted in bringing the case directly to the attention of the prosecuting authorities.

[12] We are also unable to sustain plaintiff's contention that a legal duty was imposed on defendant "to check up on the actual payments" which had been made by plaintiff before swearing to the complaint, and that her failure so to do was evidence of malice. The rule is that if there are any circumstances within the knowledge of the prosecuting witness, or which he is chargeable with knowing, which would destroy the apparent effect of the facts stated by him, or if, after obtaining the advice of counsel, and before acting upon it, other facts should come to his knowledge, which he did not submit, his good faith in seeking advice or in acting thereon would be impeached, and the defense dependent upon such good faith would fail. But it is not necessary that a prosecuting witness shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or to find out whether the accused has any defense to the charge; nor is he required to exhaust all sources of information bearing upon the facts which have come to his knowledge, and therefore if it is shown that he acts in good faith and fairly discloses to the prosecuting attorney all the facts within his knowledge relating to the offense, and is advised that there is probable cause for an arrest, his defense of probable cause

is established and he is exonerated from liability even though the defendant should show at the trial other facts sufficient to secure his acquittal and which might have been ascertained by the prosecuting witness if he had made more diligent inquiry therefor. Dunlap v. New Zealand F. & M. I. Co., supra; Ball v. Rawles, supra; Johnson v. Southern Pacific Co., supra.

[13, 14] As further evidence of malice, plaintiff calls attention to certain testimony showing that at a conference held between plaintiff's attorneys and defendant after plaintiff's arrest defendant was informed that plaintiff had actually used the $265 to pay bills against the job, and that nevertheless she refused to "drop" the prosecution unless plaintiff paid the balance of the outstanding bills. It has been held, however, that transactions occurring subsequent to the commencement of the criminal proceedings are not to be considered in determining the question of malice. Hanchey v. Brunson, 175 Ala. 236, 56 So. 971, Ann.Cas.1914C, 804.

[15, 16] As to the second ground urged for reversal, the record shows that in refutation of the charge of malice and for the purpose of showing good faith on her part, Mrs. Neilson sought to prove by her own testimony and that of Duncan Matheson the nature of the advice she received from him before going to the district attorney's office; and the evidence was excluded on objection of plaintiff. In our opinion its exclusion was error. As the authorities point out, malice being the main indispensable element of an action of this kind, not only is a plaintiff given a very wide range in proving facts and circumstances tending to establish such element, but likewise the defendant is given the same full opportunity to disprove it. 16 Cal.Jur. 748. As said in Griswold v. Griswold, supra, and again in Burke v. Watts, 188 Cal. 118, 204 P. 578, whatever tends to prove good faith tends to disprove malice and must be admitted. Therefore, a defendant is entitled to introduce any competent evidence to show that he had reasonable cause for instituting the proceeding, or that even if he did not have such cause, he was not actuated by malice (Runo v. Williams, 162 Cal. 444, 122 P. 1082; 16 Cal.Jur. 748), the court in one early case having gone so far as to say in substance that the defendant is entitled to prove any fact or circumstance which tends in the slightest degree to show a contrary motive; and that no fact or circumstance should be excluded unless the court is satisfied to a moral certainty that no rational inference may be drawn therefrom. Lyon v. Hancock, 35 Cal. 372. And it has been expressly held that for the purpose of rebutting inferences of malice a defendant may introduce evidence to show what information and advice he received from reputable persons in whom he confided and on which he relied. See Newell on Malicious Prosecution, p. 323; 38 Cor.Jur. 491; also Le Clear v. Perkins, 103 Mich. 131, 61 N.W. 357, 26 L.R.A. 627. It is true that evidence of advice given by policemen and detectives or like officers is not legally sufficient to establish the defense of "advice of counsel" (38 Cor.Jur. 431), because such defense, if established, is a complete defense. But it seems that for the purpose of disproving the charge of malice and to show good faith such evidence is admissible. Newell on Malicious Prosecution, supra. "Upon the question of malice the law is more tender towards the inexperience or the infirmities or the idiosyncrasies of parties. Malice is judged of with reference to the party, and whatever fairly tends to show that he acted with good faith, and without malice, must be received. * * * But if the party fail in showing such ground of action as would have induced prudent and careful men to have believed in the plaintiff's guilt, and to have instituted the prosecution, he may nevertheless, if he choose, show that in fact, he did act upon what he had at the time regarded as good cause either from common report or remote circumstances, such as excited suspicions in his mind to the extent of creating belief of guilt, although short of probable cause." Barron v. Mason, 31 Vt. 189, 197, quoted approvingly in Griswold v. Griswold, supra.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

11 Cal.App.2d 565

MERRON v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 10635.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1936.

1. Malicious prosecution ⇐55

Action for malicious prosecution cannot be maintained in absence of allegation and showing that proceedings upon which it is based have been legally terminated.

2. Appeal and error ⇐113(1)

Order refusing to vacate final judgment is not appealable if grounds upon which party sought to have judgment vacated existed before entry of judgment and were available on an appeal from the judgment.

3. Appeal and error ⇐113(1)

Appeal does not lie from order denying motion to vacate judgment, where such motion merely calls upon court to overrule former ruling on same facts.

4. Appeal and error ⇐356

Appeal from judgment was barred where notice of appeal was filed more than 60 days after entry of judgment.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Marion Merron against the Title Guarantee & Trust Company and others. From a judgment of dismissal and an order denying plaintiff's motion to vacate such judgment, the plaintiff appeals.

Appeal dismissed.

H. M. Mayes, of North Hollywood, for appellant.

Keogh, Cate & Colver, of Los Angeles, for respondent Title Guarantee & Trust Co.

DORAN, Justice.

On December 21, 1931, the Title Guarantee & Trust Company sued Sarah Stahler and Marion Merron in action No. 332623, superior court of Los Angeles county, and in connection with such action levied an attachment on the property of Marion Merron. The court found for the defendant Marion Merron on the basis of which this action for damages for malicious prosecution was commenced December 7, 1934.

The answer of the Title Guarantee & Trust Company denies that the order or judgment in the original action is final, and alleges that this suit for malicious prosecution is therefore premature. At the trial, after plaintiff was sworn and testified, a motion to dismiss the malicious prosecution action on the grounds that it was prematurely brought, was granted. The court found that the order and judgment in the first action, No. 332623, were not final. Judgment in the malicious prosecution action was entered April 25, 1935. On June 10, 1935, plaintiff moved to vacate this last judgment on the grounds that it was erroneous and not supported by findings in that said first judgment was in fact and in law final. The motion was denied, and from the judgment and the order denying this last motion, plaintiff filed notice of appeal on August 2, 1935.

The motion to dismiss this appeal is based on the claim that more than sixty days had elapsed between the entry of judgment and the filing of the notice of appeal, and that the order denying the motion to vacate the judgment is not an appealable order.

[1] It is the law that, before an action for malicious prosecution can be maintained, it must be alleged and shown that the proceedings upon which it is based have been legally terminated. Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 P. 168. It is admitted in the briefs on file herein that the original action No. 332623 is pending on appeal.

[2, 3] The order refusing to vacate a final judgment is not appealable if the grounds upon which the party sought to have the judgment vacated existed before the entry of the judgment and were available on an appeal from the judgment. Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459. Moreover, an appeal does not lie from an order denying a motion to vacate a judgment where such motion merely calls upon the court to overrule a former ruling on the same facts. Ratliff v. Ratliff, 100 Cal. App. 556, 280 P. 554.

[4] The notice of appeal having been filed more than sixty days from the date of the entry of the judgment, the appeal from the judgment is barred, and, for the reasons stated, the order denying the motion to vacate the judgment is not appealable.

The motion to dismiss the appeal is granted. Inasmuch as appellant, in addi-

tion to the appeal from the order denying the motion to vacate the judgment, also sought, although ineffectively, to appeal from "all orders and judgments, and findings rendered and found in above entitled action," such appeals, or attempts to appeal, are likewise dismissed.

We concur: HOUSER, P. J.; YORK, J.



11 Cal.App.2d 603

PEOPLE v. NOVO.

Cr. 1484.

District Court of Appeal, Third District, California.

Feb. 3, 1936.

Rehearing Denied Feb. 26, 1936.

Criminal law ⇐1182

Where brief was not filed for appellant and appearance was not made for him at time case was called for hearing, judgment would be affirmed (Pen.Code, § 1253).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Albert Novo was convicted of assault and burglary in the second degree, and he appeals.

Affirmed.

J. Harold McAlpine, of Santa Rosa, and Alfred J. Hennessy, Virgil Garibaldi, and Carlton D. Dethlefsen, all of San Francisco, for appellant.

Albert E. Sheets, of Sacramento, additional counsel.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Dep. Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sonoma county of felonies, to wit, assault and burglary in the second degree.

The transcript on appeal was filed in this court January 3, 1936. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on February 3, 1936. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

11 Cal.App.2d 437

HAEHLEN et ux. v. WILSON et ux.

Civ. 5314.

District Court of Appeal, Third District, California.

Jan. 27, 1936.

Hearing Denied by Supreme Court March 26, 1936.

1. Nuisance ⇐3(12)

Six and one-half foot fence built within three inches of boundary line *held* not nuisance per se (St.1913, p. 342, § 1).

2. Nuisance ⇐33

Evidence *held* insufficient to support judgment requiring removal of six and one-half foot wooden fence built within three inches of boundary line on ground that fence was injurious to health or indecent or offensive to senses or obstruction to free use of plaintiffs' property (Civ.Code, § 3479).

3. Nuisance ⇐3(12)

Property owner is not required to inclose four sides of land to maintain boundary fence along one side of property (Civ.Code, § 3479).

4. Nuisance ⇐23(1)

Adjoining property owner *held* not entitled to require removal of boundary fence on ground that it created ugly and untidy appearance, since in absence of statute courts cannot set up esthetic standards to which builders must conform (Civ.Code, § 3479).

5. Nuisance ⇐23(1)

Adjoining property owner *held* not entitled to require removal of six and one-half foot wooden boundary fence on ground that fence constituted fire hazard, although structure might diminish value of property and increase rate of insurance, since such consequences are only incidental to ownership of land in proximity to others (Civ.Code, § 3479).

6. Easements ⇐19

Doctrine of ancient lights does not apply in California so as to entitle property owner to require removal of wooden boundary fence on adjoining property on that ground (Civ. Code, § 3479).

7. Adjoining landowners ⇐8

Property owners *held* entitled to use land for all lawful purposes to which such lands might be applied provided they exercise ordinary care to prevent unnecessary injury to adjoining landowner.

8. Nuisance ⇐23(1)

To entitle property owner to require removal of boundary fence on adjoining land, malicious intent must be so predominant as motive for construction of fence as to give character to structure, and it must be manifest and positive that real usefulness of struc-

ture would be clearly subordinate and incidental (Civ.Code, § 3479).

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by R. A. Haehlin and another against Frank Wilson and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Oscar Gibbons, of Alturas, and Herbert P. Welch, of Lakeview, Or., for appellants.

A. K. Wylie, of Alturas, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal grew out of a dispute over a boundary line fence separating the property of plaintiffs and defendants.

Plaintiffs owned a lot 150 feet square situated in the northeast corner of a block in the city of Alturas. Defendants owned a lot immediately to the south of the lot of plaintiffs, and also owned a strip or corridor seven feet wide and 150 feet long, running north and south and adjoining the lot of plaintiffs on the west.

Both plaintiffs and defendants operated auto camps and had erected cabins on their respective properties, which they rented to the traveling public. Plaintiffs had built a row of six or eight cabins on the westerly side of their lot, about 15 feet from the boundary between themselves and plaintiffs. Differences arose between these adjoining owners, and defendants erected a close wooden fence about six and one-half feet in height along the easterly boundary of the seven-foot corridor, which line was, as heretofore pointed out, also the westerly boundary of the property of plaintiffs.

Thereupon plaintiffs brought this action to enjoin defendants from maintaining this fence, and after a trial upon the issues thereby presented, the trial court found the fence was constructed for the purpose of harassing and annoying plaintiffs, and created an obstruction to the premises of plaintiffs, and prevented plaintiffs from renting their apartments and cabins lying on the east of said wall; that said fence created an ugly and untidy appearance and constituted a fire hazard; that it cut off the view from the premises of plaintiffs and interfered with the comfortable enjoyment of their property, and caused plaintiffs great and irreparable injury in that they were unable to rent their cabins and apartments. The judgment based upon these findings ordered the removal of said obstruction and enjoined defendants "from building or constructing any structure of similar kind which will interfere with or obstruct the said plaintiffs in the enjoyment and comfort of their said property, or from constructing in front of or to the west of plaintiffs' property on said seven-foot strip of land of said defendants, any building or structure of similar nature to said wall that will obstruct or interfere with the plaintiffs in the comfortable enjoyment of their property that will prevent said plaintiffs from conducting and carrying on their said business of leasing their auto cabins to the public generally." From this decree the defendants appealed.

[1] In 1913 the Legislature passed an act dealing with spite fences (Stats.1913, p. 342) which provided that "any fence * * * unnecessarily exceeding ten feet in height, maliciously erected * * * for the purpose of annoying the owner * * * of adjoining property, shall be deemed a private nuisance." Section 1. Obviously this structure was not a nuisance per se. Admittedly the present action was not brought under the provisions of this act, as the court found that the "wall" as the fence is denominated in the findings, was about six and one-half feet high "built of posts cemented into the ground four inches by six inches in size and one by twelve-inch boards nailed upon scantlings or timbers attached to said posts."

Respondents apparently rely upon the provisions of section 3479 of the Civil Code wherein a nuisance is defined as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance."

[2,3] Was this six and one-half foot fence built within three inches of the boundary line between plaintiffs and defendants, entirely upon the lands of defendants, injurious to health or indecent or offensive to the senses or an obstruction to the free use of property of plaintiffs so as to interfere with the comfortable enjoyment of life or property? The trial court so found, but an examination of the evidence fails to support such a conclusion.

It appears that defendants purchased the strip in question as a means to carry off the excess water from their property, the general slope of the land being toward the north, this strip being a natural drain or canal.

Prior to erecting any fence along the boundary between plaintiffs and defendants, plaintiffs were in the habit of depositing their garbage cans upon the land of defendants and persons were using the land of defendants as a way or short cut traversing defendants' land to reach their objective, and plaintiffs at one time deposited gravel in the drain of defendants, which interfered with the drainage from the lands of defendants. To prevent these acts defendants first erected a wire fence, but persons from the property of plaintiffs still persisted in crossing the land of defendants, climbing over and through the wire fence. Plaintiffs objected to this wire fence, and defendants then removed the same and erected the one now in dispute. It is claimed that the fence does not serve as a boundary fence as it does not inclose the property of defendants, but there is no requirement that would compel a property owner to inclose the four sides of his land in order to maintain a boundary fence along one side of his property.

[4] Plaintiffs also claim the "wall" created an ugly and untidy appearance and by reason of the fact that weeds and brush accumulate against the "wall," it created a fire hazard. In the absence of some legislative action, the courts cannot set up esthetic standards to which builders must conform.

"No case has been cited * * * nor are we aware of any case, which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than a necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." Varney & Green v. Williams, 155 Cal. 318, 320, 100 P. 867, 868, 21 L.R.A.(N.S.) 741, 132 Am.St.Rep. 88.

[5, 6] The fire hazard is no greater than would be that of any wooden structure erected upon the property of defendants, and the maintenance of a frame building would give to the owners of adjoining property no right of action, although it might diminish the value of property and increase the rate of insurance. Such consequences are but incidental to ownership of land in proximity to others. McCloskey v. Kreling, 76 Cal. 511, 18 P. 433. The doctrine of "ancient lights" does not apply in California, but in any event it could not be held that a fence six and one-half feet in height would violate such a right, even if it were a recognized rule in California.

[7] We therefore can find no invasion by defendants of any right of plaintiffs. Defendants may use their land for all lawful purposes to which such lands may be applied providing they exercise ordinary care to prevent unnecessary injury to the adjoining landowner. Surely the erection of a fence six and one-half feet in height to protect their property from trespassers is not an unusual or unlawful act.

Respondents cite Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 P. 192, Ingwersen v. Barry, 118 Cal. 342, 50 P. 536, and Bar Due v. Cox, 47 Cal. App. 713, 190 P. 1056, but all deal with the application of special statutes which are not here relevant.

[8] We can find no evidence of malice, and it has been held that the "malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental." Gallagher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182; Rideout v. Knox, 148 Mass. 368, 19 N.E. 390, 2 L.R.A. 81, 12 Am.St.Rep. 560.

Inasmuch as the judgment should be reversed, we need not discuss the form of the decree itself, nor point out that the effect thereof would be to deprive defendants of any use of their property for building purposes.

The judgment is reversed.

We concur: PLUMMER, J.; THOMPSON, J.

11 Cal.App.2d 391

TULLIS v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 9998.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1936.

1. Courts ⇐472(6)

Suit for rescission of realty contract and recovery of sum of $1,631.12 paid thereunder *held* suit for equitable relief of which superior court had jurisdiction.

2. Vendor and purchaser ⇐118

Person entering into contract for purchase of realty through fraud of seller *held* not prohibited from rescinding contract by provision thereof to that effect.

3. Vendor and purchaser ⇐123

In action for rescission of contract for purchase of realty for fraud of seller, allegation that seller held title and sold property for its own use and that of other defendants and that designated defendants acquired interest in contract with knowledge of purchaser's right to rescind *held* to charge all defendants as principals, and hence all were proper parties to action.

4. Vendor and purchaser ⇐118

Default of purchaser in payment on contract for purchase of realty *held* not to defeat right of rescission for fraud, where sellers had acquiesced in making of previous payments after they were due.

5. Vendor and purchaser ⇐118

Default in payment on contract for purchase of realty would not defeat purchaser's right of rescission so long as contract was enforceable by purchaser.

6. Appeal and error ⇐866(1)

Appeal from judgment for defendants after sustaining of objection to introduction of evidence by plaintiff must be determined on sufficiency of complaint.

7. Appeal and error ⇐866(1)

On appeal from judgment dismissing action for rescission of contract for purchase of realty after sustaining of objection to introduction of evidence, contention that action was barred by laches in serving notice of rescission and commencing action could not be sustained where, under allegations of petition, it did not appear that plaintiff was guilty of laches as matter of law.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by Lauretta M. Tullis against the Title Guarantee & Trust Company and others, and the Becker-Arbuckle-Wright Corporation, and others. From a judgment for defendants Becker-Arbuckle-Wright Corporation and others, the plaintiff appeals.

Reversed.

Winterer & Ritchie, of Los Angeles, for appellant.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff brought this action praying that a contract for the purchase of real estate be declared null and void and rescinded because of alleged fraud; also for judgment against defendants for the total sums paid thereon amounting to $1,631.12; and also that it be decreed that plaintiff had a lien on the premises described to secure the repayment of said sums and that said lien be foreclosed. The cause went to trial upon the second amended complaint and an amendment thereto. We shall hereinafter refer to said pleadings as the complaint. A copy of the written contract between defendant Title Guarantee & Trust Company and plaintiff was attached to the complaint. No demurrer was interposed. Upon the trial, all defendants other than defendant Title Guarantee & Trust Company, objected to the introduction of any evidence as against said defendants upon the ground that the complaint did not state a cause of action against said defendants and said objection was sustained. Said defendants claimed that the action was one for rescission, that the complaint showed that they were not parties to the written contract, and that therefore they were not proper parties to the action. Thereafter plaintiff made an offer of proof of all of the allegations of said complaint, but said offer was rejected by the trial court. Thereupon judgment was entered reciting that: "It appearing to the court that said objection on behalf of said defendants was well taken, the same having been sustained, and no evidence having been introduced * * *, now therefore it is ordered, adjudged, and decreed that plaintiff take nothing" as against said defendants. The action against defendant Title Guarantee & Trust Company was temporarily dropped from the calendar

upon stipulation of counsel. Plaintiff appeals from the above-mentioned judgment in favor of the remaining defendants.

[1] Some question is raised in the briefs regarding the nature of this action and the jurisdiction of the superior court in view of the amount involved, to wit, $1,631.12. The first count alleged that plaintiff had served notice of rescission and had tendered a quitclaim deed to defendants but that defendants had refused, after demand made by plaintiff, to repay the $1,631.12 paid by plaintiff on the contract. The second count of the complaint was one for money had and received by defendants for the use and benefit of plaintiffs in the sum of $1,631.12. In view of the prayer of the complaint the substance of which is above set forth, we are of the opinion that said action was one for equitable relief and that the superior court had jurisdiction. Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A.L.R. 743; Fair View Farms Co. v. Superior Court, 123 Cal.App. 9, 10 P.(2d) 1011; Ingalls v. Superior Court, 121 Cal.App. 453, 9 P.(2d) 266; see, also, Philpott v. Superior Court, 1 Cal.(2d) 512, 36 P.(2d) 635, 95 A.L.R. 990; Jensen v. Harry H. Culver & Co., 127 Cal.App. (Supp.) 783, 15 P.(2d) 907; Taback v. Greenberg, 108 Cal.App. 759, 292 P. 279.

As we view this appeal, the real question involved is whether the complaint was sufficient to state a cause of action against respondents. Appellant's offer of proof was full and complete and if the complaint was sufficient as to respondents, then appellant's contention that the trial court erred in making the rulings above mentioned and in entering judgment in favor of respondents must be sustained.

[2] In support of the position taken by the trial court, respondents contend that the provisions of the contract "prohibit plaintiff from rescinding." This contention is made upon the authority of Clancy v. Becker-Arbuckle-Wright Corporation, 137 Cal. App. 43, 29 P.(2d) 868, which involved a contract containing a provision identical with the provision in the contract before us. That decision was in turn based upon Gridley v. Tilson, 202 Cal. 748, 262 P. 322, and other authorities. That the decisions in Clancy v. Becker-Arbuckle-Wright Corporation, supra, Gridley v. Tilson, supra, and the authorities cited therein have all been overruled or modified is apparent from a reading of the recent decision in Speck v. Wylie, 1 Cal.(2d) 625, 36 P.(2d) 618, 95 A.L.R. 760. We may dismiss respondents' contention with a citation of that authority.

[3] Respondents further contend that, "If the action was one for rescission of the contract, then these respondents are not proper parties defendant." A reading of the allegations of the complaint leads us to the conclusion that there is no merit in this contention. Under said allegations, respondents were not mere agents of defendant Title Guarantee & Trust Company, which was the only defendant named in the written contract. It was alleged that defendant Title Guarantee & Trust Company held title to the premises for its own use and the use and benefit of the other defendants, with the exception of Becker-Arbuckle-Wright Corporation, and that "the said premises were sold to plaintiff by said defendants in the name of the said Title Guarantee & Trust Company for its own use and benefit and for the use and benefit of said defendants." As to defendant Becker-Arbuckle-Wright Corporation, it was alleged that at or about the time of the execution of the contract, said defendant "with full notice and knowledge of the said fraudulent representations and inducements made to plaintiff and of her right to rescind said contract on account thereof, acquired an interest in said premises, the said contract Exhibit 'A,' and the moneys paid and to be paid by plaintiff thereon." It was further alleged "that the moneys which plaintiff paid for and on account of said contract were applied on the purchase price of the said premises and that said moneys were for the use and benefit of all of the said defendants and that the said defendants had and have a mutual and beneficial interest and a privity of interest in and to the said premises and the said moneys so paid by plaintiff." We need not pass on the question of whether said allegations were subject to attack by special demurrer for uncertainty. No demurrer was interposed and we are of the opinion that said allegations were sufficient to charge all defendants as principals in the vendor and purchaser relationship created by said contract. This being true, respondents were at least proper if not necessary parties to the action. We find nothing to the contrary in the authorities cited by respondents. Karst v. Seller, 45 Cal.App. 623, 188 P. 298, is cited. That case is not in point, but the language of the decision

supports the view expressed herein. It was there said, 45 Cal.App. 623, on page 626, 188 P. 298, 299: "The action in which the order here appealed from was made is on the rescission, and it is contended—we think rightly—that only the parties to such contract, *or those in privity with them,* can be joined." (Italics ours.)

[4, 5] Respondents further contend that appellant was in default at the time she attempted to rescind and that the attempted rescission was therefore ineffectual. They cite and rely upon Campbell v. Title Guarantee & Trust Co., 121 Cal.App. 374, 9 P.(2d) 264; Bryan v. Baymiller, 95 Cal. App. 481, 272 P. 1106; and Russell v. Penniston, 55 Cal.App. 492, 203 P. 813. Appellant calls attention to the fact that the alleged rescission here was based upon the ground of fraud and then cites and relies upon the opinion of the Supreme Court in denying hearing in De Bairos v. Barlin, 46 Cal.App. 665, 674, 190 P. 188. See, also, Eade v. Reich, 120 Cal.App. 32, 7 P. (2d) 1043; Lubarsky v. Chavis, 99 Cal. App. 610, 279 P. 205; Lombardi v. Sinanides, 71 Cal.App. 272, 235 P. 455; 25 Cal.Jur. p. 716. We believe that any conflict in the language of the authorities cited is more apparent than real. Here we are dealing with the allegations of the complaint. While these allegations showed a technical default in payment at the time prescribed by the contract, they further showed that respondents had acquiesced in and condoned the making of previous payments under the contract "long after the same were due and payable under the terms thereof." It thus appears from said allegations that despite the default in payment at the time prescribed, said contract remained in force and effect and was enforceable by appellant at the time of the attempted rescission. The language of some of the authorities would seem to indicate that default will never defeat rescission when the right to rescission is based upon the ground of fraud, but we are not required to discuss that question here. Under the circumstances alleged in the complaint, appellant's rights under the contract had not been terminated by the default. The authorities clearly indicate that as long as appellant could enforce the contract despite the default, such default would not defeat her right of rescission. De Bairos v. Barlin, supra; Kuehl v. Scott, 66 Wash. 318, 119 P. 742; Black on Rescission and Cancellation (2d Ed.) § 553, p. 1365.

[6, 7] It is also contended by respondents that appellant's action was barred by laches in serving notice of rescission and in commencing this action. Under the allegations of the complaint, it cannot be said as a matter of law that appellant was guilty of laches, and as this appeal must be determined upon the sufficiency of the complaint, respondents' contention may not be sustained.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



11 Cal.App.2d 414

PLAZA AMUSEMENT CO. v. CARTER, Com'r of Safety et al.

Civ. 10012.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1936.

Municipal corporations ⚖108

Where city council could, of its own motion, have submitted ordinance to electors, court would not inquire for whom each elector voted and why, to determine whether fraud had been perpetrated upon them through insertion in election notice that ordinance had been initiated by petition signed by requisite number of electors, even if requisite number had not signed.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Edward T. Bishop, and W. Turney Fox, Judges.

Action by the Plaza Amusement Company against William H. Carter, Commissioner of Safety, ex officio Mayor of the City of Santa Monica, etc., and others. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Harris & Field, of Los Angeles, for appellant.

⚖For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Boyd C. Barrington, City Atty., and Robert N. Baker, Asst. City Atty., both of Santa Monica, for respondents.

STURTEVANT, Justice.

The defendants' demurrer to plaintiff's amended complaint asking that the defendants be enjoined from enforcing an alleged invalid ordinance was sustained without leave to amend and a judgment was entered dismissing the action. From that judgment the plaintiff has appealed.

Heretofore certain electors of the city of Santa Monica prepared, circulated, and on October 5, 1933, presented an initiative petition that a certain ordinance be enacted. Those papers were headed:

"Initiative Petition

"To the Honorable, the Council of the City of Santa Monica, State of California:

"We the undersigned qualified electors of the City of Santa Monica, do hereby petition you to submit to the electorate at the next General Municipal Election, the following proposed measure, entitled: * * *" Then followed the title and enacting clause, the provisions of the ordinance under attack, and a prayer for the initiative enactment of said provisions as an ordinance. On November 1, 1933, the defendant council enacted an ordinance, No. 524, calling an election to be held December 5, 1933. In said ordinance the propositions to be voted on included the identical proposed ordinance designated in the petition hereinabove referred to. It was included in the manner following: Section 2 provides: "(2) For the purpose of submitting to the qualified electors of the City of Santa Monica, for approval or rejection, that certain ordinance in words and figures as follows, towit:" (then follows the title and ordinance as set forth in the petition). Then follows a paragraph as follows: "There having been presented to the City Council of the City of Santa Monica a petition signed by qualified electors of the city in number equal to at least twenty-five per cent (25%) of the total number of voters registered in said city at the last preceding general election, prior to the filing of said petition, asking for submission to the electors of said city of said measure, hereinabove set forth; said petition having been filed prior to sixty (60) days before the election called by this ordinance each paper of which petition had attached thereto the affidavit of a registered voter of said city, stating that all the signatures to the paper were made in his presence and that to the best of his knowledge and belief, each signature to the paper appended, was the genuine signature of the person who purports to be thereunto subscribed."

As to the ordinance under attack, it will be noted that Ordinance No. 524 contains recitals that the ordinance to be voted on was an initiative measure and that the petition was signed by more than 25 per cent. of the qualified electors of the city of Santa Monica, the requisite number of signatures to entitle it to be voted on. Claiming that in truth and in fact said petition was not signed by 25 per cent. of the qualified electors, the plaintiff then contends that the placing of said proposition on the ballot was a fraud on the electors.

If the initiative petitions were signed by 25 per cent. of the qualified electors of the city of Santa Monica, the city council did not err in submitting the ordinance. Article XV, § 1, of the Charter of said city. If they were not signed by any electors, nevertheless, by virtue of other provisions of the charter, the city council had the power of its own motion to submit said ordinance. Article XV, § 2, of the Charter of said city. The plaintiff's complaint presented the sole question as to whether the insertion in the election notice of the recital "a petition signed by qualified electors of the city in number equal to at least 25% of the total number of voters," etc., was a fraud on the electors and whether said alleged fraud could be inquired into in this action. In other words, will a court undertake to inquire of each elector how he voted and what motive prompted him to do so? In Constitutional Limitations (8th Ed.) at page 380, Mr. Justice Cooley said: "And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be enter-

ed upon." Then follows a long list of authorities. Commencing on page 451 he also said: "And the same presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives, will be applied to the discretionary action of municipal bodies, and of the State legislature, and will preclude, in the one case as in the other, all collateral attack." That rule obtains in this state. In the case entitled Oroville & V. R. Co. v. Supervisors of Plumas County, 37 Cal. 354, at page 363, the court said: "The fifth paragraph, which avers that the passage of the Act recited in the petition was procured by fraud, is objectionable, first, because it is not well pleaded, as the acts constituting the fraud are not averred. The motion admits, in effect, only those facts that are well pleaded. A general allegation of fraud in a pleading will not be regarded. Second, an Act of the Legislature is not subject to attack on that ground; and it is sufficient on this point to refer to Sherman v. Story, 30 Cal. [253] 266 [89 Am.Dec. 93]." The validity of an ordinance was under attack in Ex parte Yung, 7 Cal.App. 440, 94 P. 594. At page 442 of 7 Cal.App. at page 595 of 94 P., the court said: "It is fundamental that courts will not look into the motives of a legislative body in the exercise of its legislative powers." Similar language is used in Hadacheck v. Alexander, 169 Cal. 616, 147 P. 259. In re Sumida, 177 Cal. 388, 170 P. 823, involved another ordinance. At page 390 of 177 Cal., at page 824 of 170 P., Mr. Justice Shaw, speaking for the court, said: "The title of the ordinance declares, and its terms show that its purpose was to provide a day of rest one day in the week for those pursuing the occupations forbidden to be carried on upon Sunday. There may have been other designs in the minds of the board of trustees of the town in adopting the ordinance. But that question cannot be inquired into in this manner, nor can an ordinance be declared invalid because of the bad motives of the members of the legislative body which enacted it." An ordinance of San Francisco regulating laundries was before the court in Soon Hing v. Crowley, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145. At page 710 of 113 U.S., at page 734 of 5 S.Ct., Mr. Justice Field, writing the opinion, said: "The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense." That case seems to be one of the leading cases in America on the point presented. See Rose's Notes, vol. 12, p. 978.

Plaintiff cites and relies on Palmberg v. Astoria, 63 Or. 222, 127 P. 32. It contains nothing at variance with the foregoing authorities.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

11 Cal.App.2d 364

In re MARINE BANK OF SANTA MONICA.

Civ. 10424.

District Court of Appeal, Second District, Division 1, California.

Jan. 22, 1936.

1. Banks and banking ⇐80(2)

Evidence *held* insufficient to support finding that special savings account was opened with bank's savings department which had paid 65 per cent. to creditors, instead of commercial department which had paid only 42½ per cent. to creditors (Gen.Laws 1931, Act 652, §§ 26, 27).

2. Appeal and error ⇐1176(2)

Where facts are uncontroverted, trial court may be ordered to enter proper judgment.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Proceedings in the matter of the Marine Bank of Santa Monica, in liquidation, wherein Winifred Z. Cowen filed a petition to have claim treated as a claim against the savings department of the bank, opposed by Friend W. Richardson, as Superintendent of Banks of the State of California. From an adverse order, the Superintendent of Banks appeals.

Order reversed, and cause remanded, with directions.

Clock, McWhinney & Clock, of Long Beach, for appellant.

Hugh K. McKevitt, of San Francisco, for respondent.

ROTH, Justice pro tem.

The Marine Bank of Santa Monica (hereinafter referred to as "bank") was closed for liquidation on December 18, 1931, on which date the superintendent of banks of the state of California took charge of the bank and continued in charge thereof during all of the instant proceedings. Prior to that time Harry Cowen, who was a director and stockholder of the bank, had deposited in a special savings account with the bank the sum of $3,369.02 in the names of Winifred Z. Cowen (who was also a stockholder of the bank) or Harry Cowen. Winifred was the wife of Harry. Sections 26 and 27 of the Bank Act provide that a bank having several departments is required to keep the books, deposits, reserves, cash, securities, investments, and transactions relating to each department separate from each of the other departments (section 26, Bank Act, Stats.1931, p. 341; vol. 1, Deering's Gen.Laws, p. 241, Act 652), and that all money and assets belonging to each department, whether on hand or with other banks, and the investments made, shall be held solely for the repayment of the depositors and other claimants of each such department until all depositors and other claimants of each such department shall have been paid. Section 27, Bank Act, supra. When Harry Cowen opened the special savings account, the signature card which he signed stated on its face that it was a commercial department account. It appears also without contradiction that the account was always treated by the bank on its books and for all purposes as a commercial department account. Upon the liquidation of the bank, Winifred Z. Cowen filed with the state banking department a claim which also recited on its face that it was against the commercial department of the bank. The claim of Winifred against the bank was rejected as a general claim by the superintendent of banks, but was allowed as a deferred claim against the commercial department of the bank, to be paid only after the nonstockholding depositors should have been paid in full. At the time of the present litigation, the bank, in liquidating its assets, had paid to creditors of the commercial department 42½ per cent. and to creditors of the savings department 65 per cent.

When the claim of Mrs. Cowen was rejected, as stated, she set out to prove that, although the special savings account was opened in the names of herself and husband, the account was in fact her sole and separate property; and that, although there was stock issued by the bank to herself and to her husband, which stock stood on the books of the bank as so issued and so held, the stock was in fact her husband's stock as his sole and separate property. To establish this position an action for declaratory relief was brought prior to the instant proceeding, entitled Winifred Z. Cowen et al. v. Edward Rainey, the then superintendent of banks, and the bank, being action No. 343999, records of the superior court of Los Angeles county, hereinafter referred to as the Cowen Case. By the Cowen Case it was established that the money in the special saving account was the sole and separate property of Winifred Z. Cowen,

and that the money which purchased the stock of the bank had been issued to both the Cowens was in fact the separate property of Harry Cowen.

On the first of these issues, the findings in the Cowen Case recited in part as follows: "* * * that said deposit was the proceeds of separate property distributed to the plaintiff, Winifred Z. Cowen, from the estate of her uncle; that as between the plaintiffs it was intended that said sum should remain the separate property of said Winifred Z. Cowen even though the same was deposited under the names of Winifred Z. Cowen or Harry Cowen; that it was the intention of the plaintiffs that as to said sum, Harry Cowen was merely the agent for Winifred Z. Cowen for the purpose of withdrawing any funds therefrom needed by Winifred Z. Cowen; * * *"

As to the ownership of the stock, the court in the Cowen Case found as follows: "* * * that the certificates evidencing said ten (10) shares of stock were caused to be issued in the joint names of plaintiffs at the sole instance and request of the plaintiff, Harry Cowen, and without the knowledge or consent of the plaintiff Winifred Z. Cowen; that the plaintiff Winifred Z. Cowen did not discover that said stock certificates were issued in said joint names, or that the plaintiff Winifred Z. Cowen's name appeared as a stockholder of said bank on the books of said bank until after the defendant, Edward Rainey, as such Superintendent of Banks, took possession of the business and property of said bank; that at no time did the plaintiff Winifred Z. Cowen consent to be a stockholder of said bank and at no time did plaintiff Winifred Z. Cowen consent to the issuance of any shares of said bank in her name or in the joint name of herself and her husband, Harry Cowen; * * *"

Thereupon the court said in its findings in said Cowen Case: "As Conclusions of Law from the foregoing the Court holds and finds that the claim of the plaintiff Winifred Z. Cowen, hereinbefore referred to, representing three thousand three hundred sixty-nine dollars and 02/100 ($3369.-02) deposited in a Special Savings Account in said Bank in the names of Winifred Z. Cowen or Harry Cowen is allowed and established as a general claim in favor of the plaintiff Winifred Z. Cowen and against said Marine Bank of Santa Monica, a corporation, and the capital and assets and properties thereof, payable with the claims of all non-stockholding depositors of said Bank."

There was no appeal from the judgment in the Cowen Case which was in consonance with the findings and conclusions recited, and the judgment therein is now final. It will be observed from the foregoing that the judgment in the Cowen Case decided Mrs. Cowen's contentions in her favor, except that the findings in said case do not, nor does the judgment, determine whether the special savings account of Mrs. Cowen was in fact with the commercial department of the bank, or with the savings department.

In order to determine this final question, Mrs. Cowen commenced the instant proceeding in the within entitled liquidation action by requesting the superior court to issue an order to the superintendent of banks requiring him to show cause why the claim of Mrs. Cowen should not be treated as a claim against the savings department of the bank. This order was issued upon affidavits made by Mrs. Cowen and others on her behalf, which recited in great detail the history of the claim as we have generally outlined the same, and specifically advises the court that by reason of the failure of the superintendent of banks to treat the claim of Mrs. Cowen as one against the savings department of the bank, she was damaged to the extent of 22½ per cent. of her claim, said percentage being the difference between the rate of payment of claims against the savings department over claims against the commercial department. The order was heard entirely on affidavits, and the trial court then decided that the claim of Mrs. Cowen should be allowed against the savings department of bank, and made its order accordingly. Superintendent of banks appeals from that order.

The affidavits filed showed nothing in addition to what has been generally recited, except that Mr. Cowen, a stockholder and director of the bank, thought that when he opened the special savings account with the bank it was with the savings department of the bank, and referred to an inadvertent admission in the answer of the superintendent of banks in the Cowen Case, which calls the account of Mrs. Cowen a savings account. The recital of facts thus far given makes clear that the card signed by Mr. Cowen when he opened the account stated on its face that it was with the commercial

department of the bank. It is also clear from Mrs. Cowen's repeated and insistent admissions, as well as from the findings and judgment in the Cowen Case, that Mr. Cowen was the duly authorized agent of Mrs. Cowen to open a special savings account. We have scrupulously examined the affidavits, and while much is made of phrases such as "special savings" and "savings" and the connotations of the respective terms, and although some of the averments in the affidavits filed in support of Mrs. Cowen's claim are in substance that the Cowens thought or were told that a special savings account was a "saving account" with special privileges, all of which averments are specifically and vigorously denied by the affidavits filed by the officers of the bank, who assisted in the opening of the account, there is nothing in any of the affidavits filed to support Mrs. Cowen's position which asserts or avers that the special savings account was with the savings department of the bank, or that the Cowens, or either of them, was told that the special savings account was with the savings department of the bank. Neither is there any recital of facts in any of the affidavits from which it can be reasonably inferred that Mr. Cowen or Mrs. Cowen were ever led to believe that such was the situation. We are able to discover no evidence that the special savings account was ever opened with the savings department of the bank. The averments in the affidavits, without the aid of so decisive a piece of evidence as the card originally signed by the duly authorized agent of Mrs. Cowen, to wit, her husband, when the special savings account was opened, do in fact demonstrate that Mr. Cowen, a stockholder and director of the bank, knew that a "special savings" account was with the commercial department of the bank. It is also worth noting that, after making the original alleged mistake as to which department of the bank handled special savings accounts, both Cowens made the same mistake when a claim was originally filed with the superintendent of banks. This claim was made on a form entitled "commercial department." In explanation of this fact, both Cowens say in their respective affidavits: "* * * that although said claim was on the form entitled, 'Commercial Department,' said affiant and his wife did not understand the purport thereof, nor was it explained to them, in so far as the words 'Commercial Department' appearing in said claim were concerned; that affiant and his wife believed that said claim was similar to any claim made for a regular savings account in said bank; * * *" This explanation we regard as a lame one, when considered first as against the uncontroverted and incontrovertible fact that Mr. Cowen as the admitted and adjudicated, duly authorized agent of Mrs. Cowen signed the contract with the bank to make a deposit for Mrs. Cowen with the commercial department of the bank, and when considered secondly as against such evidence as the original claim filed against the commercial department of the bank and signed by Mrs. Cowen herself.

[1, 2] We find no evidence to support the order of the trial court. Upon well-settled principles of law the order appealed from is reversed. Since the facts are uncontroverted, the trial court is ordered to deny the application of Winifred Z. Cowen to have her claim declared a claim against the savings department of said bank.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 530

SHEEHAN v. PIONEER LUCKY STRIKE GOLD MINING CO.

Civ. 10677.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1936.

1. Appeal and error ⇐876

On appeal from order setting aside judgment of dismissal after demurrer to amended complaint had been sustained, reviewing court is concerned only with legality of order setting aside judgment of dismissal, and merits of action are to be determined by trial court (Code Civ.Proc. § 473).

2. Judgment ⇐162(1)

On motion to set aside judgment of dismissal after demurrer to amended complaint had been sustained, court should not try merits, but should permit filing of affidavits by respective parties on subject of excuse for permitting default (Code Civ.Proc. § 473).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Appeal and error ⇐982(1)

Whether verified amended complaint, presented and relied upon for showing of merit on motion to set aside judgment of dismissal after demurrer to second amended complaint had been sustained, stated cause of action, *held* for trial court (Code Civ.Proc. § 473).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Howard J. Sheehan against the Pioneer Lucky Strike Gold Mining Company. From an order setting aside a judgment of dismissal of plaintiff's action, the defendant appeals.

Affirmed.

Pelton & Warne, of Los Angeles, for appellant.

Edward A. Adams and Lee J. Myers, both of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from an order of the superior court setting aside a judgment of dismissal of plaintiff's action. A demurrer to the second amended complaint was sustained with leave to amend within ten days. Upon the failure of plaintiff to amend within the time allowed, a judgment of dismissal was entered upon application of defendant. A motion to set aside the judgment of dismissal was made under section 473 of the Code of Civil Procedure and granted by the court.

Defendant presented for filing its verified third amended complaint and relied upon this pleading for a showing of merit. Counsel for defendant do not contend that a sufficient showing was not made to excuse the failure of plaintiff to amend within ten days. Neither do they contend that a verified amended complaint may not serve as a sufficient showing of merit. Counsel for defendant contend, however, that the third amended complaint does not set forth facts sufficient to entitle plaintiff to judgment. They also assert that certain statements made by plaintiff upon the taking of his deposition are contradictory of allegations made in his third amended complaint. Upon these grounds they ask this court to rule that the order should be reversed for an insufficient showing of merit.

[1-3] Upon this appeal the court is concerned with the legality of the order setting aside the judgment of dismissal. The merits of the action are to be determined by the trial court. The third amended complaint may be attacked in the trial court on demurrer and the alleged falsity of the allegations of the complaint determined upon the trial of the action if it reaches that stage. It is well settled that in proceedings of this nature the court should not try the merits of the action but should permit the filing of affidavits by the respective parties on the subject of the excuse for permitting the default. Gracier et al. v. Weir, 45 Cal. 53; Francis v. Cox, 33 Cal. 323; Douglass v. Todd, 96 Cal. 655, 31 P. 623, 31 Am.St.Rep. 247. In Waybright v. Anderson, 200 Cal. 374, 253 P. 148, 150, the court said: "It is true that affidavits of merits were not filed herein, but, under the doctrine of Sampanes v. Chazes, supra [54 Cal.App. 612, 202 P. 462], the service and filing of verified amended complaints rendered unnecessary the presentation and filing of affidavits of merits. We are not prepared to hold that said verified amended complaints fail to state causes of action, as urged by the appellants, for this question is primarily one to be decided by the trial court."

The order is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



11 Cal.App.2d 451

SWARTZBAUGH v. SAMPSON et al.

Civ. 1605.

District Court of Appeal, Fourth District, California.

Jan. 27, 1936.

Hearing Denied by Supreme Court March 26, 1936.

1. Joint tenancy ⇐1

Joint tenancy requires unities of interest, title, time, and of possession, with distinguishing incident being right of survivorship, and but one estate being created (Civ.Code, §§ 683, 686).

2. Joint tenancy ⇐4

Estate in joint tenancy can be severed by destroying one or more of necessary unities of interest, title, time, and possession, either by operation of law, by death, by voluntary or involuntary acts of joint tenants, or by cer-

tain acts or omissions of one joint tenant without consent of other.

3. Joint tenancy ⇐8
Each joint tenant owns equal interest in all of fee and has equal right to possession of the whole.

4. Joint tenancy ⇐8
Possession by one joint tenant is possession by all.

5. Joint tenancy ⇐8
Joint tenant out of possession ordinarily cannot recover exclusive possession of joint property from cotenant or eject cotenant in possession, but can only recover right to be let into joint possession with cotenant.

6. Joint tenancy ⇐10
Joint tenant cannot ordinarily maintain action against cotenant for rent or for profits derived from cotenant's own labor, but may compel cotenant in possession to account for rents collected from third parties.

7. Joint tenancy ⇐8
Act of one joint tenant without cotenant's consent or express or implied authority from cotenant generally cannot bind or prejudicially affect rights of cotenant.

8. Joint tenancy ⇐12
Lease to all of joint property by one joint tenant is not nullity, but is valid contract in so far as lessor's interest in joint property is concerned.

9. Joint tenancy ⇐12
Joint tenant who had not joined in leases of joint property executed by cotenant could not maintain action to cancel leases, where lessee was in exclusive possession of leased property, since leases were valid contracts giving lessee same right to possession of leased property that lessor had.

10. Landlord and tenant ⇐61, 66(1)
Lessee in possession under lease generally cannot dispute lessor's title nor hold adversely to lessor while holding under lease, since adverse possessor must generally claim property in fee.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Lola Desirra Swartzbaugh against Sam A. Sampson and another. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Rutan & Mize, of Santa Ana, for appellant.

Marshall & Farnham, of Long Beach, for respondent Sampson.

MARKS, Justice.

This is an action to cancel two leases executed by John Josiah Swartzbaugh, as lessor, to Sam A. Sampson, as lessee, of two adjoining parcels of land in Orange county. A motion for nonsuit was granted at the close of plaintiff's case, and this appeal followed.

Defendant Swartzbaugh and plaintiff are husband and wife. They owned, as joint tenants with the right of survivorship, 60 acres of land in Orange county planted to bearing walnuts. In December, 1933, defendant Sampson started negotiations with plaintiff and her husband for the leasing of a small fraction of this land fronting on highway 101 for a site for a boxing pavilion. Plaintiff at all times objected to making the lease, and it is thoroughly established that Sampson knew she would not join in any lease to him.

The negotiations resulted in the execution of an option for a lease, dated January 5, 1934, signed by Swartzbaugh and Sampson. The lease, dated February 2, 1934, was executed by the same parties. A second lease of property adjoining the site of the boxing pavilion was signed by Swartzbaugh and Sampson. This was also dated February 2, 1934, but probably was signed after that date. Plaintiff's name does not appear in any of the three documents, and Sampson was advised that she would not sign any of them.

The walnut trees were removed from the leased premises. Sampson went into possession, erected his boxing pavilion, and placed other improvements on the property.

Plaintiff was injured in February, 1934, and was confined to her bed for some time. This action was started on June 20, 1934. Up to the time of the trial plaintiff had received no part of the rental of the leased property. Sampson was in possession of all of it under the leases to the exclusion of plaintiff.

There is but one question to be decided in this case which may be stated as follows: Can one joint tenant who has not joined in the leases executed by her cotenant and another maintain an action to cancel the leases where the lessee is in exclusive possession of the leased property?

This question does not seem to have been decided in California, and there is not an entire uniformity of decision in other jurisdictions. In decisions on analogous questions where courts reached like conclusions, they did not always use the same course of reasoning in reaching them. It seems necessary, therefore, that we consider briefly the nature of the estate in joint tenancy and the rights of the joint tenants in it.

[1] A clear definition of the estate is contained in Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003, 1004, as follows: "Respecting joint tenancy, it is only necessary to amplify the definition quoted from section 683 [Civ.Code] by a quotation from the case of De Witt v. San Francisco, 2 Cal. 289, 297, opinion rendered in 1852, defining joint tenancy as follows: 'Joint tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely: unity of interest, unity of title, unity of time, unity of possession. (1 Cruise's Digest, by Greenleaf, 355, § 11. 2 Crabb's Real Prop. § 2303.) But the distinguishing incident is a right of survivorship. (1 Cruise, 359, § 27; 2 Crabb's Real Prop. § 2306.)' These four characteristics are the acknowledged elements of a joint tenancy. Tiffany on Real Property, vol. 1 (2d Ed.) p. 625, par. 191; 2 Blackstone, Comm. 180. It is at once evident that there is thereby created but one estate, and that each of the four elements, unity of interest, unity of title, unity of time, and unity of possession, must be present, and an absence of any one would change the nature of the estate."

For a proper understanding of some of the cases we will cite, it should be borne in mind that, at the common law, estates in joint tenancy were favored over those in common, and that "to create a tenancy in common it was necessary to add restrictive and explanatory words, so as to expressly limit the estate to the grantees to hold as tenants in common and not as joint tenants" (2 Thompson on Real Property, 926) and that this rule has been abrogated by statute in California and many other states. See sections 683, 686, Civ. Code.

[2] An estate in joint tenancy can be severed by destroying one or more of the necessary unities, either by operation of law, by death, by voluntary or certain involuntary acts of the joint tenants, or by certain acts or omissions of one joint tenant without the consent of the other. It seems to be the rule in England that a lease by one joint tenant for a term of years will effect a severance, at least during the term of the lease. Napier v. Williams, [1911] 1 Ch. 361; Doe v. Read, 12 East, 57, 104 Reprint, 23; Roe v. Lonsdale, 12 East, 39, 104 Reprint, 16; Palmer v. Rich, [1897] 1 Ch. 134, See Thompson on Real Property, p. 929, § 1715. We have found no case in the United States where this rule has been applied. From the reasoning used and conclusions reached in many of the American cases its adoption in this country seems doubtful.

[3-5] One of the essential unities of a joint tenancy is that of possession. Each tenant owns an equal interest in all of the fee, and each has an equal right to possession of the whole. Possession by one is possession by all. Ordinarily, one joint tenant out of possession cannot recover exclusive possession of the joint property from his cotenant. Jamison v. Graham, 57 Ill. 94. He can only recover the right to be let into joint possession of the property with his cotenant. He cannot eject his cotenant in possession. Noble v. Manatt, 42 Cal.App. 496, 183 P. 823.

[6] Ordinarily one joint tenant cannot maintain an action against his cotenant for rent for occupancy of the property or for profits derived from his own labor. He may, however, compel the tenant in possession to account for rents collected from third parties. McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454; Richardson v. Superior Court, 101 Cal.App. 638, 281 P. 1077. See, also, White v. Stuart, Buchanan & Co., 76 Va. 546, 567; Messing v. Messing, 64 App.Div. 125, 71 N.Y.S. 717; Rush v. Rush, 144 Misc. 489, 258 N.Y.S. 913; Smith v. United, etc., Co., 113 W.Va. 178, 166 S.E. 533.

The case of Stark v. Barrett, 15 Cal. 361, discusses the rights of a grantee of one cotenant of a specific parcel of property. It is there said:

"The case has been argued as though the question presented was to be determined by the rules of the common law, and in that view we have examined it. For its

determination, considered by the common law, it is immaterial whether the grantees took the land embraced in their grant as joint tenants or as tenants in common. During the lives of the tenants, the rules regulating the transfer of their interest are substantially the same, whether they hold in joint tenancy or in common. Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate. This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract, owned by several, is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract; as, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if, upon the partition of the general tract, they should not be allotted to the grantor. Subject to this contingency, the conveyance is valid, and passes the interest of the grantor. And, this we consider the result of the several cases cited by the counsel of the appellants. They go to the extent that the conveyance can have no legal effect to the prejudice of the cotenant, not that it is absolutely void, that it is ineffectual against the assertion of his interest in a suit for partition of the general tract, but is good against all others. Until such partition, the grantee will be entitled to the use and possession as cotenant, in the parcel conveyed, with the other owners. (Bartlet v. Harlow, 12 Mass. 348 [7 Am.Dec. 76]; Varnum v. Abbot et al., 12 Mass. 474 [7 Am.Dec. 87]; Nichols v. Smith, 22 Pick. [Mass.] 316.)

"In Robinett v. Preston's Heirs, 2 Rob. [273] 278, the precise question under consideration was passed upon by the Court of Appeals of Virginia. The defendant in that case claimed under a grant from the State of North Carolina, and traced his title through a conveyance from one of the grantees of a parcel, described by metes and bounds, of the premises granted. To the introduction of the conveyance the demandants objected, on the ground that as no partition of the grant had been made by the grantees, it was not competent for one of them, a joint tenant of the granted land, to convey by metes and bounds such portion as he pleased, without the consent of his cotenant, and in prejudice of his rights, and that such conveyance was wholly void. The Circuit Court sustained the objection, and excluded the conveyance, and judgment passed for the demandants; but the Appellate Court held the ruling erroneous and reversed the judgment. In its opinion, after referring to the cases in Massachusetts, and stating that in Varnum v. Abbot et al., 12 Mass. [474] 480 [7 Am.Dec. 87], it was held that a similar deed was not absolutely void, the Court said: 'With us there are still stronger reasons, if any were required, for holding such deeds not to be void. All grants are to be most strongly construed against the grantor; and by our statute (1 Rev.Code ch. 99, sec. 20) all alienations purporting to pass or assure a greater right or estate than the grantor may lawfully pass or assure, shall operate as alienations of so much of the right and estate as the grantor might lawfully convey. Under the covenants of such a deed as this, though it might be ineffectual to pass the particular tract as against the cotenant, yet as against the grantor and strangers it would be effectual to pass the interest of the grantor in the tract. Possession under it would support a release from the cotenant; and if the part conveyed were assigned to the alienee on partition, the title would be absolute at law. The deed being good against the grantor, the entry of the tenant under it would be lawful; and though it might be inoperative, so far as the rights of the cotenant were thereby prejudiced, yet as it would invest the grantee with the estate of the grantor, so far as he could lawfully convey, the grantee would be tenant in common with the cotenant of his grantor, to the extent of the interest conveyed. His possession and seizen would be the possession and seizen of both, because such possession and seizen would not be adverse to the right of his companion, but in support of their common title.'"

[7] It is a general rule that the act of one joint tenant without express or implied authority from or the consent of his cotenant cannot bind or prejudicially af-

fect the rights of the latter. Simpson v. Bergmann, 125 Cal.App. 1, 13 P.(2d) 531; Oberwise v. Poulos, 124 Cal.App. 247, 12 P.(2d) 156; Summer v. Vinson, 211 Ky. 571, 277 S.W. 849; Lawrence v. Fielder, 186 Ky. 324, 216 S.W. 1068.

In the application of the foregoing rule, the courts have imposed a limitation upon it which, in effect, is a qualification of its broad language. This perhaps is due to the nature of the estate which is universally held to be joint in enjoyment and several upon severance. This limitation arises in cases where one joint tenant in possession leases all of the joint property without the consent of his cotenant and places the lessee in possession. It seems to be based upon the theory that the joint tenant in possession is entitled to the possession of the entire property and by his lease merely gives to his lessee a right he (the lessor) had been enjoying, puts the lessee in the enjoyment of a right of possession which he (the lessor) already had, and by so doing does not prejudicially affect the rights of the cotenant out of possession; it being conceded that the joint tenant not joining in the lease is not bound by its terms and that he can recover from the tenant of his cotenant the reasonable value of the use and enjoyment of his share of the estate, if the tenant under the lease refuses him the right to enjoy his moiety of the estate. See Codman v. Hall, 9 Allen (91 Mass.) 335; Eagle Brewing Co. v. Netzel, 159 Ill.App. 375; Frans v. Young, 24 Iowa, 375.

It has been held that each joint tenant during the existence of the joint estate has the right to convey, mortgage, or subject to a mechanic's lien an equal share of the joint property. People v. Varel, 351 Ill. 96, 184 N.E. 209. It has also been held that one joint tenant in possession of personal property may pledge his interest in the property to another; that the pledgee's rights are valid to the extent of the pledgor's interest; that each joint tenant has an equal right of possession and so the pledgee has the same right of possession that the pledgor had; that the joint tenant out of possession can maintain no action against the pledgee that he could not maintain against the pledgor. Frans v. Young, supra. It was held in Johnson v. Nourse, 258 Mass. 417, 155 N.E. 457, and Cram v. Cram, 262 Mass. 509, 160 N.E. 337, that one joint tenant cannot maintain trover against another except where the joint tenant in possession has completely ousted the other and deprived him of the benefit of the property and that mere refusal of possession is not such ouster.

In 2 Thompson on Real Property, p. 929, § 1715, it is said: "One joint tenant may make a lease of the joint property, but this will bind only his share of it." The same rule is thus stated in 1 Landlord and Tenant, Tiffany, 405: "One of two or more joint tenants cannot, by making a lease of the whole, vest in the lessee more than his own share, since that is all to which he has an exclusive right. Such a lease is, however, valid as to his share."

[8] The foregoing authorities support the conclusion that a lease to all of the joint property by one joint tenant is not a nullity but is a valid and supportable contract in so far as the interest of the lessor in the joint property is concerned.

While the qualities of estates of joint tenancy and a tenancy in common differ, the rights of possession are quite similar. It was thus expressed by Lord Coke: "It appeareth, that the essential difference between joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, and tenants in common by severall titles, or by one title and by severall rights; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both viz. that their occupation is individed, and neither of them knoweth his part in severall." Palmer v. Rich, [1897] 1 Ch. 134, at page 142. This being so, decisions on similar questions to the one we are considering, where estates in common are concerned, have considerable weight.

In the case of Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 P. 45, the plaintiff, a tenant in common brought an action to oust defendant who was holding under a lease from another tenant in common. The Supreme Court reversed the judgment in favor of plaintiff and said:

"The evidence does not support the judgment. It is expressly alleged in the complaint that 'this plaintiff and one Chay Yune are successors in interest of said E. L. Goldstein, and to said building on the north-west corner of Dupont and Clay streets, and in and to said lease executed to Pee Han, and that they hold title to the

same as tenants in common.' The uncontradicted evidence shows that the defendants were in possession of the property, with the consent of said Chay Yune. All that the plaintiff was entitled to, therefore, was to be let into possession with the defendants,—to enjoy their moiety. Freem. Co-Ten. §§ 180, 220; Pickard v. Perley, 45 N.H. [188], 191, [86 Am. Dec. 153]; Ord v. Chester, 18 Cal. [77] 30.

"One tenant in common may, 'by either lease or license, * * * confer upon another person the right to occupy and use the property of the co-tenancy as fully as such lessor or licensor himself might have used or occupied it if such lease or license had not been granted. If either co-tenant expel such licensee or lessee, he is guilty of a trespass. If the lessee has the exclusive possession of the premises, he is not liable to any one but his lessor for the rent, unless the other co-tenants attempt to enter, and he resists or forbids their entry, or unless being in possession with them, he ousts or excludes some or all of them.' Freem. Co-Ten. § 253. There is no evidence tending to show that the defendants ever refused to allow the plaintiff to enjoy the use of the premises with them. The judgment does not confine the plaintiff's right of recovery to his own moiety, but provides that the plaintiff shall have and recover from defendants the restitution and possession of the premises described in the complaint."

The case of Zeigler v. Brennen.an, 237 Ill. 15, 86 N.E. 597, 600, is of interest here. The defendant was in possession of part of the common property under an assignment of a lease from one of the tenants in common to one Seybert. Rapp, one of the plaintiffs was in possession of another portion of the common property under a lease from all of the tenants in common who joined with him in an action to cancel defendant's lease. In denying them relief, the Supreme Court of Illinois said: "The lease is void as against the grantor's co-tenants; that is to say, in determining their rights in the property, no consideration is to be given to the existence of that lease. But it does not follow therefrom that it is of no effect as between the lessor and the lessee, even while the premises remain undivided. On the contrary, as between them it is just as valid as a lease of property owned entirely by the lessor. Freeman on Cotenancy and Partition, § 253. The law is that one tenant in common may not prejudice the rights of his co-tenants by a conveyance of any specific part, or of any interest, right, or license in any specific part, of the common property, but such a conveyance is valid as against the grantor, at least by way of estoppel. It is only where, and as far as, it comes in conflict with the interests of the co-tenants, that it is void. Fredrick v. Fredrick, 219 Ill. 568, 76 N.E. 856; Finch v. Green, 225 Ill. 304, 80 N.E. 318. In the present case, after the execution of the lease to Seybert, he and George Zeigler together held and possessed all the privileges, right, title, and interest in the land, including the oil and gas, that George Zeigler had before possessed, and the rights of George Zeigler's co-tenants remained precisely as they were before that lease was made. For example, if there was a partition of the land, then the Seybert lease would follow the interest of George Zeigler and be operative only upon the land set off to him, but, as between George Zeigler and Seybert, the latter had the same right in reference to operating the land for oil and gas that George Zeigler had prior to the execution of the lease, subject only to such burdens as were imposed upon Seybert by that instrument. It follows, therefore, that nothing was conveyed to Rapp by George Zeigler when he joined in the lease which Rapp took. Rapp has no greater right than if his lease was alone with the children of Martha V. Zeigler; the Seybert lease having been recorded and operations having been in full swing on the land under that instrument when Rapp took his lease. Neither of the lessees can maintain partition (Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53 [122 Am.St. Rep. 144]), and neither of them has the right to operate without the consent of the other (Murray v. Haverty, 70 Ill. 318), but either of the lessors can maintain partition, and in that way give to his lessee the sole right to operate for oil and gas in the portion of the land which may be set off to such lessor. If appellants and Rapp can agree upon the method by which this land shall be operated then they may operate it, one-half of the oil going to Rapp, out of which he shall pay to each of the children of Martha V. Zeigler one-eighteenth part of that half as rent or royalty, the other half of the oil going to appellants, out of which they shall pay one-eighth part of that half to George Zeigler

as rent or royalty. If, however, appellants and Rapp cannot so agree, neither can rightfully operate the land for oil unless some one of the tenants in common elect to have the land partitioned, in which event the rights of each lessee will attach to the land set off to his lessor or lessors. It is true that this view requires the children of Martha V. Zeigler or their lessee to agree upon the operation of the land for oil and gas, in case they so desire to operate while the land remains undivided, with appellants instead of with George Zeigler; but in law this is not to be regarded as prejudicial to their interests, as it cannot be said that George Zeigler's lessees will be less ready to join with the children or their lessee in operating the land than would George Zeigler himself." See, also, Grundy v. Martin, 143 Mass. 279, 9 N.E. 647; Hayden v. Patterson, 51 Pa. 261; Harlan v. Central Phosphate Co., (Tenn.Ch.App.) 62 S.W. 614.

The following cases support the conclusion announced in the foregoing cases that, where one tenant leases the common property to a stranger to the title, the other tenants in common cannot cancel the lease or recover exclusive possession of the entire property. Lick v. O'Donnell, 3 Cal. 59, 58 Am.Dec. 383; Woods v. Rolls (Tex. Civ.App.) 268 S.W. 988; Rolls v. Woods (Tex.Com.App.) 291 S.W. 532; Keay v. Goodwin, 16 Mass. 1; Rising v. Stannard, 17 Mass. 282; King v. Dickerman, 77 Mass. (11 Gray) 480; Tainter v. Cole, 120 Mass. 162; Satterlee v. Umenthum, 47 S.D. 372, 198 N.W. 823; Nott v. Owen, 86 Me. 98, 29 A. 943, 41 Am.St.Rep. 525; Earp v. Mid-Cont. Pet. Corp., 167 Okl. 86, 27 P.(2d) 855, 91 A.L.R. 188; Compton v. People's Gas Co., 75 Kan. 572, 89 P. 1039, 10 L.R.A.(N.S.) 787; Sarchet v. Legg, 60 Or. 213, 118 P. 203; Pastine v. Altman, 93 Conn. 707, 107 A. 803.

Tiffany, in 1 Real Property 684, says that the effect of a lease by one cotenant is to give the lessee the right to share in the possession of the leased property for the term of the lease. This coincides with statements made in Lee Chuck v. Quan Wo Chong & Co., supra, and in Noble v. Manatt, supra, that all a cotenant out of possession is entitled to is to be let into possession with the lessee of his cotenant to enjoy his moiety. This rule has not been uniformly adopted, and its application in this state has not been directly decided.

[9] As far as the evidence before us in this case is concerned, the foregoing authorities force the conclusion that the leases from Swartzbaugh to Sampson are not null and void but valid and existing contracts giving to Sampson the same right to the possession of the leased property that Swartzbaugh had. It follows they cannot be canceled by plaintiff in this action.

As we have remarked, the courts are not in entire accord on the rules we have set forth nor in the reasoning used in arriving at the conclusions announced. This is illustrated in the following citations: Southern Inv. Co. v. Postal Telegraph-Cable Co., 156 N.C. 259, 72 S.E. 361, Ann.Cas.1913A, 224; Dorn v. Dunham, 24 Tex. 366; Mussey v. Holt, 24 N.H. 248, 55 Am.Dec. 234; Gage v. Gage, 66 N.H. 282, 29 A. 543, 28 L.R.A. 829; Buchanan v. Jencks, 38 R.I. 443, 96 A. 307, 2 A.L.R. 986; Baker v. Wheeler & Martin, 8 Wend. (N. Y.) 505, 24 Am.Dec. 66; Muskeget Island Club v. Prior, 228 Mass. 95, 117 N.E. 2; Susquehanna, etc., Co. v. St. Clair, 113 Md. 667, 77 A. 1119, 140 Am.St.Rep. 452. See 33 Harvard Law Review 482.

[10] Plaintiff expresses the fear that, as one of the leases runs for five years, with an option for an additional five years, she may lose her interest in the leased premises by prescription. It is a general rule that a lessee in possession of real property under a lease cannot dispute his landlord's title nor can he hold adversely to him while holding under the lease. If, as held in numerous cases, the lessee of one cotenant holds the possession of his lessor and that a cotenant in possession holds for the other cotenant and not adversely, Sampson would have great difficulty in establishing any holding adverse to plaintiff without a complete and definite ouster. As a general rule, an adverse possessor must claim the property in fee, and a lessee holding under a lease cannot avail himself of the claim of adverse possession. There are certain exceptions to this rule which do not seem to be applicable to this case. There is no showing that plaintiff ever demanded that Sampson let her into possession of her moiety of the estate nor is there anything to indicate that he is holding adversely to her.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

11 Cal.App.2d 607

N. Y. K. OIL CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 10573.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1936.

1. Contempt ⇐54(4)

Court had no jurisdiction to punish for contempt, where affidavit, as basis of contempt, showed only suspicion that order allegedly violated was in fact violated, and affidavit did not set forth acts showing that a contempt was committed.

2. Contempt ⇐55

Court had no jurisdiction to punish for contempt for violation of order where parties, who allegedly violated order, were not served with it, and where it could not be presumed that parties had knowledge of such order.

Writ of prohibition from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by the N. Y. K. Oil Company and others for a writ of prohibition against the Superior Court of the County of Los Angeles and others.

Alternative writ made peremptory.

Francis B. Cobb, of Los Angeles, for petitioners.

Andrews & Andrews and Mortimer A. Kline, all of Los Angeles, for respondents.

DORAN, Justice.

Plaintiffs in an action in the superior court had petitioned the court to order a subsurface directional survey of an oil well, the result of such survey to be used as evidence at the trial of the action then pending.

A temporary restraining order was issued July 3, 1935, and by a later order, on July 8th, continued in effect pending the hearing on an order to show cause set for July 12th. After the hearing on the order to show cause, the plaintiffs' petition was granted and certain individuals were named and appointed by the court to make the survey. The restraining order was continued in effect pending the survey.

On July 23d, a citation for contempt was issued, returnable August 7th, wherein petitioners herein were ordered to show cause why they should not be punished for contempt for disobeying the previous orders of July 3d, 8th, and 12th. The contempt citation was based on affidavits of eight individuals, which, in substance, recited the steps that were taken in making the survey, a description of the condition of the well, and in general, at the most, created a suspicion that petitioners herein had placed something in the well which prevented the survey.

On August 7th, petitioners herein demurred to the affidavits and contempt citation on the grounds that the court was without jurisdiction of the persons of the defendants, petitioners herein, and that the affidavits did not state facts sufficient to constitute a cause of action for contempt. The affidavit of service shows affirmatively that petitioners herein were not served with the original order, the alleged violation of which it is sought to make the basis of a contempt proceeding.

[1] The petition for a writ of prohibition must be granted. It is well-settled law that an affidavit, as the basis of a contempt citation, must set forth acts showing in themselves the fact that a contempt has been committed by the party charged, and, failing to do so, the court is absolutely without jurisdiction in the matter. Frowley v. Superior Court, 158 Cal. 220, 110 P. 817. The affidavits relied upon by respondent do not meet this requirement; suspicion is not sufficient.

[2] Moreover, petitioners were not served with the order, which, it is alleged, was violated by them, and which alleged violation constitutes the basis of the contempt citation. Under the circumstances presented here, it cannot be assumed that they had knowledge of the order.

Let a writ issue making the alternative writ heretofore herein issued by this court peremptory.

We concur: HOUSER, P. J.; YORK, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

11 Cal.App.2d 562

RENNER et ux. v. MEISSNER et al.

Civ. 10011.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1936.

1. Mortgages ⇐586

Foreclosure judgment in action against mortgagor and persons receiving land with knowledge of mortgage could have no force as to such persons beyond declaration that their interest in land was subsequent to lien of mortgage, where record did not disclose interest of such persons.

2. Mortgages ⇐576

Whether mortgagor was estopped from raising defense of statute of limitations would not be considered on appeal from judgment of foreclosure where bill of exceptions contained no exceptions and was incomplete in setting forth proceedings (Code Civ.Proc. §§ 650, 652, as amended by St.1933, pp. 1878, 1880).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Gustave A. Renner and wife against Emelia Meissner, also known as Emelia E. Meissner, and others. From the judgment, the defendants appeal.

Affirmed.

Victor Ford Collins and Arnold M. Cannan, both of Los Angeles, for appellants.

L. V. Beaulieu, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to foreclose a mortgage on real property executed by defendant Meissner. The defendants Ramsey, husband and wife, were joined upon allegations that they claimed some interest in the realty unknown to plaintiffs. At the trial a deficiency judgment was waived against Meissner, and a decree of foreclosure was entered.

The note was executed on May 12, 1925, payable on May 15, 1928. The complaint was filed October 6, 1933. It pleaded facts purporting to toll the running of the statute of limitations, which was the only defense tendered by the defendants.

Though the respondents pleaded a written acknowledgment and extension of the indebtedness, this was found to be untrue. What they rely on is an oral promise made by the mortgagor wherein she agreed to make quarterly payments if the mortgagees would not put her to the expense of making a new mortgage. The Ramseys are said to be purchasers after the statute had run, but without knowledge of these conversations.

Respondents place some stress on the paragraph of the mortgage which provides in case of default that the mortgagees "without limitation or restriction by any present or future law, shall have the absolute right, upon commencement of any judicial proceeding to enforce any right under this mortgage, including foreclosure thereof, to appointment of a receiver. * * *" The clear meaning of this language is that the mortgagees shall have the right to the appointment of a receiver for all purposes of any suit under the mortgage, notwithstanding the limitations of any laws relating to the appointment of receivers.

[1] There is nothing in the record which discloses the interest of the Ramseys other than that they "took" with knowledge of the mortgage. Whether they were purchasers for value or with notice of some of the facts held to have estopped Meissner, whether they assumed the burden of the lien, or whether they "took" other than by purchase, the pleadings, the finding, and the evidence brought up in the bill of exceptions are all silent. The judgment as to them can, therefore, be of no force beyond the declaration that, whatever their interest may be, it is subsequent to the lien of the mortgage.

[2] The judgment against the defendant Meissner is defended on the ground that she was estopped by her conduct from raising the defense of the statute, but no record has been prepared which would justify a review of the findings of fact upon which this conclusion is based. Hence, we should not be understood as holding that the facts appearing in the purported bill of exceptions are sufficient as a matter of law to support the conclusion that Meissner was estopped, or that the interest of the Ramseys was subordinate to the lien of the mortgage by reason of the estoppel of Meissner. The purported bill of exceptions contains no exceptions whatever. Code Civ.Proc. § 650, as amended by St. 1933, p. 1878. Furthermore, it is obvious-

ly incomplete in setting forth the "proceedings." It contains a small amount of testimony and affirmatively states that this testimony was "in addition to the matters set forth in defendants' Bill of Exceptions." It fails, however, to set forth the contents of the so-called "defendants' Bill of Exceptions." If the trial court refused to allow a proper bill of exceptions "in accordance with the facts," appellants had their remedy under section 652 of the Code of Civil Procedure, as amended by St. 1933, p. 1880. Having failed to present a record sufficient to warrant a reversal, this court must affirm the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 370

LOVELACE v. FREE et al.

Civ. 10687.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1936.

Hearing Denied by Supreme Court March 19, 1936.

1. Limitation of actions ⇐127(4)

In action on defendant's contract to convey property in return for plaintiff's services for life, amended complaint alleging value of services and other matters given by plaintiff *held* to toll statute by constituting basis for subsequent amendment filed over two years after defendant left plaintiff's residence and containing complete and proper allegations concerning value of services, etc. (Code Civ. Proc. § 339, subd. 1).

2. Judgment ⇐585(3)

Subject-matter of action on defendant's contract to convey property in return for plaintiff's services for life *held* not previously litigated in plaintiff's action against defendant for money had and received, wherein court rejected contention that plaintiff delivered money to defendant as part payment for insurance policy.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Eula B. Lovelace against Arthur M. Free and others. Judgment for defendant named, and plaintiff appeals.

Reversed.

George L. Hampton, of Los Angeles, for appellant.

Lawrence W. Young, of Fresno, for respondent.

WOOD, Justice.

Judgment was rendered in favor of defendant upon his pleas that the statute of limitations barred plaintiff's action and that the matter had been previously adjudicated between the parties.

Plaintiff filed her complaint on May 19, 1933, in which she alleged that an agreement had been entered into between herself and defendant on or about July 29, 1925, whereby plaintiff would permit defendant to occupy her home and would render defendant various services such as furnishing him with board, personal care, nursing, etc., and in consideration thereof defendant agreed to treat plaintiff as a life employee. Plaintiff further alleged that "in consideration of plaintiff's agreeing to perform such agreement on her part and performing the same, during the joint lives of said parties, said A. M. Free agreed to and did treat plaintiff as a life employee, and agreed that he would transfer and in proper manner convey to her all the property then owned by him, or thereafter to be acquired by him, both real and personal, and did on or about the 2d day of April, 1926, execute and deliver to plaintiff an instrument in writing by which he disposed of all his property by will in favor of plaintiff, and thereafter on or about the month of November, 1931, he procured in conjunction with plaintiff a policy of life insurance from the defendant Ætna Life Insurance Company of Hartford, Connecticut, for $20,000.00 and agreed that said policy should belong to said parties for their joint support for their joint lives, and then go to the survivor of them." It was further alleged that plaintiff permitted defendant to occupy her residence property as his home from April 2, 1926, until November 22, 1932, when defendant moved away from her home without her consent and refused to accept further performance of the agreement by plaintiff; that between the dates just mentioned plaintiff rendered the services in accordance with her agreement. In

the prayer of the complaint plaintiff asked that defendant be enjoined from encumbering or disposing of his real estate and that a receiver be appointed to preserve the real property. Plaintiff also prayed for "such judgment and decree in the premises as may be meet and in accordance with law and equity."

An amendment to the complaint was filed on July 14, 1933, in which plaintiff set forth the life expectancy of both parties and the income of defendant, together with an allegation that if defendant had performed the contract according to its terms she would have received a maintenance for the balance of her life of the value of $60,000. In said amendment she also alleged: "And the value of the services, rents, board and other matters given by plaintiff in performance which plaintiff actually rendered to said Arthur M. Free as far as he permitted her to perform were of the value of $20,000; and the total damages suffered by plaintiff by reason of said acts of said defendant Arthur M. Free were and are the sum of $60,000." Plaintiff in this amendment added an additional prayer for judgment against defendant in the sum of $60,000. On November 24, 1934, plaintiff filed another amended complaint in which her causes of action were separately stated and in which she made the following allegation: "That the reasonable value of the room, board, personal care, nursing, automobile transportation, driving, care of said defendant's clothing and linens, and other services and accommodations furnished said defendant by plaintiff, at his special instance and request as aforesaid, during the said time from April 2nd, 1926, until November 22nd, 1932, was and is the sum of Ten Thousand Dollars ($10,000.00)." In this last-mentioned amended complaint plaintiff also alleged, in her first cause of action thereof, that she had advanced to defendant the sum of $4,000 as a part of the purchase price of a contract of annuity insurance. In her second cause of action in the last-mentioned amended complaint plaintiff reiterated the allegations contained in her original complaint. Before trial the first cause of action was dismissed by plaintiff.

Defendant by his answer pleaded the statute of limitations as a bar to plaintiff's action and also pleaded as a defense that the subject-matter of the action had been previously adjudicated.

The action came on for trial before a jury, but the trial court excused the jury and entertained defendant's motion to dispose of the matter by first considering his motion to dismiss upon the two grounds, hereinabove set forth. Defendant presented the judgment roll in another action between the parties and also the transcript of the testimony of the two parties given in the other action. Thereupon the court made an order sustaining the contentions of defendant and in the judgment in defendant's favor provided as follows: "Now, therefore, by reason of the law it is hereby ordered, adjudged and decreed that defendant Arthur M. Free have judgment in the above entitled action on the grounds that said actions and all the material issues thereof have heretofore been adjudicated in the action entitled 'In the Superior Court of the State of California, in and for the County of Los Angeles, Eula B. Lovelace, Plaintiff, v. Arthur M. Free et al., Defendants, No. 357301', and that said actions are barred by Section 339, Subdivision 1, of the Code of Civil Procedure of the State of California."

[1] The ruling of the trial court that plaintiff's action was barred by the statute of limitations cannot be upheld. Although it is true that the amended complaint in its final form containing complete allegations properly set forth, was not filed until November 24, 1934, more than two years after defendant left the residence of plaintiff, it is also true that in July, 1933, and well within the statutory period, plaintiff amended her complaint by setting forth facts as a basis for demanding judgment for the value of the services performed, and asked judgment in a sum sufficient to include the value of the services. The allegations were not made in an approved manner and the cause of action was not separately stated, but they clearly served as a basis for the second amendment and prevented the running of the statute.

[2] The trial court erred in ruling that the subject-matter of the action had been litigated in superior court action No. 357301. The record does not disclose the exact date of the filing of action No. 357301, but the verification of the complaint was made on May 16, 1933. It is apparent that the two actions were filed at approximately the same time. In action No. 357301 plaintiff sued defendant for $4,000 "for moneys had and received from the

plaintiff to and for her use." Defendant in his answer in that action denied that he "became indebted to plaintiff in the sum of $4,000 or any other sum or at all, for moneys had and received, or for any other matter, or at all." The transcript of the testimony of defendant taken in action No. 357301 reads as follows: "The defendant Arthur M. Free testified in said Action No. 357301, that he had received the sum of $4,000 from said plaintiff on or about the 24th day of September, 1931, and that in consideration thereof he released a deed of trust in the sum of $4,500.00 which he held and owned and which was an encumbrance on the home of said plaintiff Eula B. Lovelace." The testimony of plaintiff given in action No. 357301, as disclosed by the bill of exceptions in the case now before us, is as follows: "Eula B. Lovelace testified that upon the return of defendant from a trip around the world, that said defendant was a very sick man, and that he promised to will his entire estate to the plaintiff, and that the plaintiff rendered services to defendant, and that said services consisted of the use of the residence of said plaintiff by said defendant and for the furnishing by plaintiff to said defendant of board and room, personal care, nursing, driving him in her automobile, looking after and caring for his clothes and linen, furnishing all of the linen for him in her home, and doing everything customarily done by a homemaker under the circumstances, and that plaintiff testified that her services were worth $10,000.00." The trial court in action No. 357301, in addition to finding untrue plaintiff's allegation that defendant became indebted to her for $4,000 "for moneys had and received from the plaintiff to and for her use," found that it was not true that plaintiff delivered $4,000 to defendant as part payment for an insurance policy. The said trial court also found that the plaintiff on September 24, 1931, delivered to defendant the sum of $4,000 "as and for and in consideration of the said defendant releasing and canceling a Deed of Trust owned and held by said defendant, securing a Promissory Note in the sum of $4,500.00, on the home of said plaintiff at 817 Micheltorena street, Santa Barbara, California, and that on or about said day said Deed of Trust was released on said property, and said note was cancelled by said defendant." Said trial court also found that "it is not true that at the time of the said release of said Deed of Trust that said plaintiff and said defendant Arthur M. Free agreed that said Arthur M. Free would release said Deed of Trust and cancel said note in consideration of former services rendered by said plaintiff to said defendant Arthur M. Free, such as the use of the residence of said plaintiff by said defendant, and the furnishing by said plaintiff to said defendant of board and room, personal care, nursing, driving him in her automobile, looking after and caring for his clothes and linen, furnishing all of the linen for him in her home, and doing everything customarily done by a home maker under the circumstances."

It will be noted that in action No. 357301 plaintiff sued in simple language for money had and received and defendant entered a simple denial to such allegation. The findings of the trial court in that action went far afield from the pleadings. It is not shown by the pleadings or by the findings that the subject-matter of the present litigation was litigated between the parties. The court merely held in that action that the sum of $4,000 was not delivered as part of the purchase price for an insurance policy, but was paid to secure the release of a trust deed. It was expressly held that the release of the trust deed was not given in consideration of services which had been rendered by plaintiff. The issues, as framed in action No. 357301, are manifestly different from the issue presented by the pleadings in the present case, and the findings of the court in the former action do not purport to pass upon the merits of the claim now presented by plaintiff.

Our attention has been called by the briefs on file to the case of Lovelace v. Free, 140 Cal.App. 264, 35 P.(2d) 342. The judgment in that case was not pleaded in the present case, and it is not now contended that it is a bar to this action.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

CORONA INV. CO. v. RIEDMAN et al.

Civ. 10692.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1936.

Rehearing Denied March 2, 1936.

Hearing Denied by Supreme Court April 6, 1936.

1. Judgment ⇐729

Judgment for lessor in lessee's action to quiet title to casing in oil well *held* not res judicata of action by assignee of sublessee for 50 per cent. of value of casing payable under lease to lessee if lessee should forfeit lease and lessor should require lessee to leave casing in well, where in the prior action lessor successfully prevented attempt to have issue of payment for the casing determined.

2. Mines and minerals ⇐77

Evidence sustained finding that lessors notified lessees of desire to retain oil well casing under terms of lease whereby, upon abandonment by lessees, lessors could demand that lessees leave casing in well; lessors then being required to pay 50 per cent. of original cost of casing.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the Corona Investment Company against F. C. Riedman and another. From an adverse judgment, defendants appeal.

Affirmed.

H. W. Elliott and Robert E. Moore, Jr., both of Los Angeles, for appellants.

E. V. Knauf, of Los Angeles, and W. Ward Johnson, of Long Beach, for respondent.

WOOD, Justice.

Defendants appeal from a judgment against them in the sum of $6,798.79, rendered in an action to recover 50 per cent. of the cost of certain oil well casing. A contract was made on May 8, 1929, by defendants, as lessors, and F. M. Barkwill and E. L. Howard, as lessees, whereby the lessees agreed to drill an oil well on the property of the lessors. The lease contained the following provision: "In the case of abandonment of any well by Lessee, if the Lessor desires to retain the same, he may notify the Lessee to that effect and thereupon the Lessee shall leave such casing in the well as the Lessor may require, and the Lessor shall pay to the Lessee fifty per cent (50%) of the original cost of such casing on the ground." The original lessees drilled a well to the depth of 1,200 feet and assigned their rights to J. C. Baddeley and Frank E. Lewis, who continued the drilling and placed additional casing in the well. Thereafter, the sublessees abandoned the well. Their rights have been assigned to the plaintiff.

[1] It is now contended by defendants that the subject-matter of the action has been adjudicated in another action. After the abandonment of the well the present defendants on October 24, 1930, commenced an action in the superior court to quiet title to the real estate involved in the lease. Among the defendants therein named were the original lessees and the sublessees. A default judgment was entered in favor of the Riedmans, but this judgment was vacated on February 21, 1931. Between the date of the entering of the default judgment and February 21, 1931, the Riedmans entered into a new lease with Chiksan Oil Company, Limited, covering the well and gave the last-named company a bill of sale of the casing, with warranty of title. After the default judgment was set aside defendants Baddeley and Lewis filed an answer claiming that their rights in the lease had not been forfeited, and asking to have quieted their title to the casing. They also filed a cross-complaint naming Chiksan Oil Company, Limited, as cross-defendant, and sought to quiet their title to the well and casing as against the cross-defendant. Upon the trial of the action, defendants Baddeley and Lewis sought to amend their pleadings for the purpose of asserting their claim to 50 per cent. of the cost of the casing. Their motion was opposed by the Riedmans, and the trial court sustained their objection, making this observation: "I think that is a matter of a separate action. It seems inconsistent to the court to allow you to file the cross-complaint in this quiet title suit. I think I will sustain the objection. You will have to file another action." The Riedmans prevailed in the action, and the judgment was affirmed on appeal. Riedman v. Barkwill, 139 Cal. App. 564, 34 P.(2d) 744.

Under the circumstances outlined, the defendants' plea of res judicata cannot be upheld. They prevented plaintiffs' attempt to have the present issue determined in the former action and now inconsistently seek to have the court declare that the entire

controversy, including the present issue, was in fact adjudicated in the former action. United Bank & Trust Co. v. Hunt, 1 Cal.(2d) 340, 34 P.(2d) 1001.

[2] Defendants contend that the finding that they notified plaintiffs of their desire to retain the casing is not supported by the evidence. Defendants sold the casing to the Chiksan Company with warranty of title. The casing remained in the well, and was actually used by the Chiksan Company in the production of oil. The witness Fairfield testified that defendant F. C. Riedman, who handled the transaction on behalf of both defendants, told Baddeley and Lewis in his presence that he desired to acquire the casing with a view to using the well. Other evidence to sustain the finding appears in the record. The finding is amply supported.

Other points made by defendant are not of sufficient importance to justify discussion.

The judgment is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



11 Cal.App.2d 478

REYBURN v. YOUNG et al.

Civ. 10781.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1936.

1. Specific performance ⇐86

Action in equity to enforce agreement to dispose of property in particular way by devise is governed by rules applicable to specific performance.

2. Specific performance ⇐114(1)

To state cause of action for specific performance, plaintiff must allege performance, offer of performance, or sufficient excuse for nonperformance of conditions required of him by contract.

3. Specific performance ⇐114(4)

Where complaint to enforce agreement not to revoke reciprocal wills failed to allege that plaintiff had performed, or offered to perform, her part of agreement, or excused nonperformance thereof, specific performance of agreement would be denied.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Rose B. Reyburn against Adah Hunt Young individually and as special administrator of the Estate of Joseph Stuart Reyburn, deceased, and others. From a judgment for plaintiff, defendants appeal.

Reversed.

See, also, 54 P.(2d) 87.

H. E. Gleason, of Los Angeles, for appellants.

Barry Sullivan, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal on the judgment roll alone from a default judgment entered in favor of plaintiff.

The complaint alleged that on September 21, 1927, Joseph Stuart Reyburn and Rose B. Reyburn, husband and wife, entered into a property settlement, dividing their property and agreeing that they would not revoke reciprocal wills which they executed on the same date. Thereafter the parties were divorced and Joseph Stuart Reyburn married Edna Hunt Reyburn, and executed a new will, naming as sole beneficiaries Edna Hunt Reyburn and his son. He died March 7, 1932. Plaintiff brought this action for the purpose of having the terms of the property settlement with the deceased specifically enforced.

The defendants rely for reversal of the judgment on the proposition that the complaint does not state facts sufficient to constitute a cause of action.

[1-3] This contention is tenable. The action is one in equity to enforce an agreement to dispose of property in a particular way by last will and testament and is therefore referable to the subject of specific performance for the principles of law applicable. Rundell v. McDonald, 62 Cal. App. 721, 728, 217 P. 1082. It is well settled that in order to state a cause of action for specific performance plaintiff must allege (a) performance, (b) an offer of performance, or (c) a sufficient excuse for nonperformance, of the terms and conditions of the contract upon her part to be

performed. 58 Cor.Jur. 1161, § 484; Chadbourne v. Stockton Savings & Loan Society, 88 Cal. 636, 639, 26 P. 529; Lynn v. Knob Hill Improvement Co., 177 Cal. 56, 60, 169 P. 1009. In the instant case there is no allegation in the complaint of any one or more of the foregoing prerequisites to the statement of a cause of action for specific performance of a contract.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 476

REYBURN v. YOUNG et al.

Civ. 10782.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1936.

1. Specific performance ⇐86

Action in equity to enforce agreement to dispose of property in particular way by devise is governed by rules applicable to specific performance.

2. Specific performance ⇐90

To entitle party to specific performance of contract, party must have performed, offered to perform, or proved sufficient excuse for not performing, all conditions required of party by contract.

3. Specific performance ⇐90

Where plaintiff who sued to enforce property settlement and agreement not to revoke reciprocal wills had not performed all conditions required of her by settlement agreement, specific performance of contract was properly denied.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Rose B. Reyburn against Adah Hunt Young, individually and as administratrix with the will annexed of the Estate of John Stuart Reyburn, deceased, and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

See, also, 54 P.(2d) 86.

Barry Sullivan, of Los Angeles, for appellant.

H. E. Gleason, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal on the judgment roll alone from a judgment in favor of defendant after a trial before a court without a jury.

September 21, 1927, Joseph Stuart Reyburn and Rose B. Reyburn, husband and wife, entered into a property settlement, dividing their property and agreeing that they would not revoke reciprocal wills which they had executed on the same date. Thereafter the parties were divorced and Joseph Stuart Reyburn married defendant, Edna Hunt Reyburn, and executed a new will, leaving all of his property to the said defendant and his son. He died March 7, 1932. Plaintiff brought this action for the purpose of having the terms of the property settlement with the deceased enforced.

The trial court found that the plaintiff had not performed all of the things to be done by her according to the terms of the property settlement.

[1, 2] This, being an action in equity to enforce an agreement to dispose of property in a particular way by last will and testament, is one which is referable to the subject of specific performance for the principles of law applicable. Rundell v. McDonald, 62 Cal.App. 721, 728, 217 P. 1082. It is well settled that, to entitle a party to specific performance, he must have (a) performed, (b) offered to have performed, or (c) proved a sufficient excuse for not performing, all the conditions required of him by the terms of the contract. Civ.Code, sec. 3392; Goodale v. West, 5 Cal. 339; Cates v. McNeil, 169 Cal. 697, 707, 147 P. 944.

[3] Therefore, since the trial court found (and no attack is made upon the finding) that the plaintiff had not performed all of the things to be done by her, according to the terms of the property settlement agreement, she was not entitled to specific enforcement of the contract, and judgment properly was in favor of the defendant.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

11 Cal.App.2d 626

TUCK v. GUDNASON.

Civ. 9645.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1936.

Rehearing Denied March 6, 1936.

1. Contracts ⇐54(1)

Dress fabricator's agreement to fabricate dresses exclusively for dealer constituted sufficient consideration for dealer's agreement to give fabricator patterns up to 300 dozen per week.

2. Contracts ⇐9(1)

Contract whereby dress fabricator agreed to fabricate dresses for dealer at prices varying according to character of sample furnished between fixed minimum and maximum prices *held* sufficiently certain as to price.

3. Frauds, statute of ⇐144

Where dress fabricator discontinued old business, leased larger premises for five years, remodeled premises, and purchased equipment relying on dealer's promise to employ her to exclusion of others to fabricate dresses for dealer for five years, estopped dealer from relying on statute of frauds as defense to action for breach of contract.

4. Pleading ⇐237(8)

Doctrine of abandonment of contract sought to be raised because of difference between contract alleged in third amended complaint and that alleged in the previous complaints *held* unavailable where amendment, permitted by court to conform to proof, stated cause of action grounded on good contract.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Elsie C. Tuck against Krist Gudnason. Judgment for defendant, and plaintiff appeals.

Judgment reversed, and new trial ordered.

Snook & Snook & Chase, of Oakland, for appellant.

James E. Waddell, of Oakland, for respondent.

McNUTT, Justice pro tem.

Krist Gudnason was an extensive dealer in women's wash dresses which were made up for him by shops in San Francisco and Oakland from pattern materials furnished by him. Elsie Tuck, a Chinese, operated a small hemstitching and dressmaking shop in Oakland, working for no person in particular. Gudnason had her fabricate some dresses, patterns for which he furnished, and was so pleased with her workmanship that he proposed that she abandon her business and obtain large quarters with sufficient machinery to devote her time exclusively to the manufacture of his products, upon a guaranteed minimum, and for a period of five years. It is claimed that about the sixth day of September, 1929, at Oakland, she and Gudnason entered into an oral contract adapted to accomplish such purpose; that he breached the contract, in consequence of which she brought suit. At the conclusion of the plaintiff's case the defendant moved for a nonsuit. The court deferred ruling until the end of the case. After the evidence was all in the plaintiff moved for leave to amend her complaint to conform to proofs, which motion was granted, and so the pleading upon which she stood on the granting of the motion for nonsuit was her third amended complaint.

The first question presented is as to whether the oral agreement pleaded was a contract or merely a naked pact ineffective for want of mutuality of obligation. Since if a contract it was within the statute of frauds, the next question is whether the defendant is estopped to set up the statute because so doing would, in effect, accomplish a fraud upon her, she having so altered her position to her disadvantage, to fit and equip herself to carry out the contract that the assertion of the statute would work an unconscionable wrong upon her.

Briefly, the contract, which we take from the allegations of the third amended complaint, was as follows: At about December 6, 1929, at Oakland, the parties entered into an oral contract by the terms of which the defendant Gudnason agreed that in consideration of the plaintiff Tuck discontinuing the dressmaking business which she had been conducting at a named place in that city, and of entering into a lease from the owner of larger premises in said city for a term of five years, commencing January 1, 1930, she to be personally liable for the rents reserved in said lease, and of her so remodeling the leased premises as to fit the same for a wash dress factory, and of purchasing equipment sufficient to enable her to turn out a minimum of 300 dozen dresses per week,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

and of thereafter so increasing the plant to produce a greater number, and of her devoting her entire time to the manufacture of wash dresses for defendant, to the exclusion of other persons, the defendant, from and after the 1st of January, 1930, would employ plaintiff and plaintiff's equipment to manufacture such dresses from cloth furnished and designed and cut to size and pattern by defendant for that purpose, up to plaintiff's capacity during the time plaintiff was instructing and training workers for approximately six months after said date, at minimum prices ranging from $3.25 per dozen up to $6 per dozen, according to style, the exact price per dozen for the several styles to be agreed upon by the parties as the style might, from time to time, change, the minimum, however, to be $3.25 per dozen, and that when plaintiff should have completed the training of workers sufficient to enable her to turn out from her factory 300 dozen per week, which training period the parties to the agreement approximated to be six months, defendant would, for a period of five years after January 1, 1930, employ her and her factory and equipment, to the exclusion of other persons, to turn out dresses for him from patterns furnished by him for that purpose. Such manufacture should not exceed plaintiff's capacity of 300 dozen per week at the prices above indicated.

The evidence shows that plaintiff, though under a lease at the time she was approached by the defendant, abandoned her then location, though, of course, still liable under the lease, and after leasing for five years premises adapted to the purposes of the contract, obligated herself to a considerable extent for equipment and proceeded to the performance of the agreement. The defendant, under the evidence, supplied her with materials and orders for some time; during the period of training of operators she turned out all the work he gave her. After that period for but one month did he give her 300 dozen patterns a week to fabricate, and under one excuse or another never lived up to his agreement, and, finally, gave her so little work that her income was not sufficient to enable her to meet her obligations on machinery and under the lease, with the result that she lost the machinery and abandoned the premises, though liable on the lease, and brought the present action for damages.

Admittedly this contract, since not to be performed within one year, is within the statute of frauds. The grounds assigned on motion for nonsuit are that estoppel to set up the statute of frauds as a special defense was defectively pleaded; that estoppels must be mutual. The court granted the motion, and from the colloquy as disclosed by the transcript, the court interpreted the second ground, to wit: Want of mutuality of estoppel, to mean that there was nothing in the contract to show "that she would be compelled to do his work," or, in other words, that, the statute of frauds aside, there was no contract because of want of mutuality of obligation.

That there was mutuality of obligation is evident. The books are replete with cases illustrative of agreements of this general character. It would serve no useful purpose to discuss any extended number of them. They illustrate situations wherein manufacturers of iron products agree to purchase all their pig iron from named producers, or where canners of fruit agree to take all their cans from certain manufacturers. Under the tests laid down in Bartlett Springs Company v. Standard Box Company, 16 Cal.App. 671, 117 P. 934, 935, and cases therein discussed, it would seem that this agreement is not nudum pactum, but was a binding contract. The Bartlett Springs Company had entered into an agreement with the box company whereby the latter was to sell and the former was to purchase certain kinds of wooden boxes to the entire extent of the springs company's demand for the period of one year from the date of the contract. The market price of boxes increased and the box company only partly performed its contract, filling an order for only a small number of boxes. The springs company purchased boxes elsewhere as needed during the contract period and sued to recover from the box company the difference between the contract price and that at which it had bought boxes elsewhere. Judgment went for the plaintiff, and the same was affirmed.

The court therein quotes at length from 9 Cyc. 327, part of which follows: "The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may 'wish' during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal lia-

bility at all. The correct view of the case is that there is no agreement binding on the promisor, but simply an offer on his part, which may be accepted by giving an order until such time as it is actually withdrawn or expires by limitation of time. Where, however, the acceptance does really impose any obligation on the accepter, then a consideration is present and a binding contract results; and this is so wherever the accepter's freedom of action is in any way limited."

[1] Testing the instant agreement by this doctrine, it appears that the acceptor's (Tuck's) freedom of action is limited. She so circumscribed the sphere of her own endeavors by agreeing to work for and to fabricate dresses exclusively for Gudnason as to constitute a consideration for his agreement to give her patterns up to 300 dozen per week.

We gather from the briefs that respondent's contention is that notwithstanding Gudnason was to furnish her a minimum during the contract period, she did not bind herself to manufacture anything. On the contrary, not only did she bind herself to manufacture such articles as he might send her for that purpose, but the limitations upon her activity, that is, her agreement to work for no one but him, is the consideration which makes this agreement a contract.

[2] It is again urged, by respondent, that the contract wants certainty in that the price per dozen of the garments is not fixed. It is elementary, however, that that is certain which can be made certain, and while there was a price differential here it was not fraught with the element of uncertainty because the price varied between a minimum and a maximum according to the character of the sample to be furnished.

[3] We came now to the question of estoppel to set up the statute of frauds. Respondent says that fraud is not pleaded and fraud is never to be presumed. Granting the truth of such assertions, estoppel does not consist of or grow out of any intentional fraud committed, as in this case, by the dress dealer upon the dress fabricator, but rather it exists where she has so altered her position to her disadvantage, relying upon promises made by him, that it would be unconscionable and would be in the nature of a fraud upon her to permit him to assert that the contract must be in writing.

This rule is illustrated in the case of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Seymour held the position of captain in the police department; he had been urged by Charles L. Fair and others to resign his position and enter the services of the Fair heirs; that after some discussion between him and Fair and Oelrichs, husband of one of the defendants, he was promised a ten-year contract for $300 a month. Having assented and resigned his public position, he took the place of superintendent of buildings. His salary was paid for some time and he was discharged. There is a difference between the two cases in that in the Seymour Case they agreed to reduce the agreement to writing, which they never did. However, it is not apparent that that difference alone renders inoperative the principle that it would be unconscionable to permit the respondent in this case to plead the statute where she had altered her position in the manner above indicated in reliance upon respondent's promise to supply her with work over a period of five years.

"As to the second element, it is not the law that fraud must exist at the time the declaration is made to support an estoppel. 'All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design.' Seymour v. Oelrichs, 156 Cal. 782, 786, 106 P. 88, 95, 134 Am.St.Rep. 154; Comer v. Associated Almond Growers, 101 Cal.App. 687, 690, 282 P. 532." Standard Oil Company v. Woolner, 113 Cal.App. 66, at page 70, 298 P. 77, 79.

Respondent contends that in order that plaintiff should have the benefit of her asserted estoppel there must have been mutual estoppels in this case and cites, among other cases, Spinney v. Downing, 108 Cal. 666, 41 P. 797. But the cases relied upon by respondent are those in which there was no mutuality of obligation so that, so far as his authorities are concerned, mutuality of estoppel is used synonymously with want of mutuality of obligation, and, hence, with absence of contract.

[4] Respondent makes the further point that, since there is a difference between the contract as set forth in the third

amended complaint and that contained in the previous complaint or complaints there must have been an abandonment by the parties of the original contract, and that abandoned contract may not be revived. This argument answers itself. The court permitted an amendment of the complaint to conform to proofs. Therefore, if the amended complaint, the only one before the court, stated a cause of action grounded upon a good contract, the doctrine of abandonment is unavailable, and if there are allegations in the earlier complaints inconsistent with the testimony given by the plaintiff and by her witnesses, at best a conflict in testimony is involved.

The record is voluminous. It contains conflicts; but viewed most favorably to the plaintiff, it shows that there was such a contract as is pleaded, performance of the same by her and breach by defendants.

The motion of plaintiff for a new trial should have been granted, hence the judgment is reversed and a new trial ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



11 Cal.App.2d 469

GIANDEINI et al. v. RAMIREZ et al.

Civ. 9852.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1936.

1. Attachment ⇐11

To sustain attachment in action on note, plaintiffs *held* bound to establish either that debt was never secured, or that, if secured, security became valueless (Code Civ.Proc. §§ 537, 726).

2. Attachment ⇐11
Mortgages ⇐218

That mortgage was valueless when executed because value of property did not exceed amount of prior incumbrance *held* to give mortgagees no right to sue on mortgage note or maintain attachment without foreclosure (Code Civ.Proc. §§ 537, 726).

3. Attachment ⇐211
Mortgages ⇐218

Mortgagees suing on mortgage note without foreclosure *held* not entitled to maintain attachment on mere allegation, unsupported by evidence, that security had become valueless; mortgagees being precluded from confessing falsity of other allegations that security was valueless when given (Code Civ. Proc. §§ 537, 726).

4. Attachment ⇐244

Though notice of motion to discharge attachment was defective because not stating grounds of motion, defects *held* cured by accompanying affidavit disclosing ground relied on (Code Civ.Proc. § 1010).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Camillo Giandeini and another against Salvador Ramirez and another. From an order refusing to discharge an attachment, defendants appeal.

Reversed.

Benjamin Chipkin, of Los Angeles, for appellants.

Charles I. Rosin, of Los Angeles, for respondents.

SHINN, Justice pro tem.

Appeal from an order refusing to discharge an attachment.

The action is on a note secured by a mortgage on real property. The original complaint on the note alleged the giving of the mortgage to plaintiffs, and that as of the date the complaint was filed the amount of an encumbrance prior to that of plaintiffs was in excess of the value of the real property, and hence that as of that date plaintiffs' security had no value. By an amended complaint filed before the motion to discharge the attachment was heard, it was alleged as follows: "That at the time of the execution of said promissory note, the defendants herein executed a real estate mortgage as security for the moneys set out in the said promissory note. That the security given by the said real estate mortgage has without any act of the plaintiffs become valueless, and that the plaintiffs have no security whatsoever for the said indebtedness. That the said real estate mortgage given to the plaintiffs is now and was at the time of the execution thereof subject to a first encumbrance against the real property covered by the said mortgage to the plaintiffs, and that the obligation on the first encumbrance against the said real property was at the time of the execution thereof, and

is now, greatly in excess of the value of the said property, and the said real property has no value whatsoever in excess of the amount of the first encumbrance, and that the mortgage held by the plaintiffs herein is of no value, and is no security on the obligation sued upon and was valueless when given to plaintiffs."

The affidavit for attachment stated that the debt had not been secured by any mortgage or lien upon real estate or personal property or any pledge of personal property. With the notice of motion to discharge the attachment, the defendants served and filed an affidavit of defendant Salvador Ramirez in which it was averred that when plaintiff took the mortgage it was contemplated by the parties that in the event of a default the security should be first exhausted before any demand for a personal deficiency should be made; that the security was not valueless, but that the mortgaged property was of the present value of $7,000, ample to pay both encumbrances, and that the first encumbrance had not been foreclosed. A counteraffidavit which we will hereafter refer to was filed by plaintiffs' counsel. Upon this record the court heard and denied the motion to discharge the attachment.

[1] In order to sustain the attachment it was incumbent upon plaintiffs to establish either of two facts: (a) That the debt had not been secured originally; or (b) that, if secured in the beginning, the security later became valueless. In our opinion neither of these facts was established by the showing made on behalf of plaintiffs.

[2] If we assume that the court found from the allegations of the amended complaint and the affidavit for attachment that the value of the real property when the second mortgage was given did not exceed the amount of the first encumbrance, that fact does not give plaintiffs the right to maintain this action on the debt without foreclosure, and consequently does not give them the right to maintain the attachment.

The Supreme Court held in Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086, 1087, that the word "secured," as used in section 726 of the Code of Civil Procedure, "does not mean that the security shall be adequate, or that in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the plaintiff is relieved from bringing the action to foreclose. The proper construction of the language of the statute is that, if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure." That was a case in which the court found that at the time of the commencement of the action the land was worth less than the prior encumbrances, but did not find what its value was at the time the mortgage was given, and therefore it did not appear that there had been any depreciation in value. It was held that the plaintiff could not maintain a suit on the note under section 726 of the Code of Civil Procedure, and was not given the right to sue by section 537 of the Code of Civil Procedure. The principle upon which the case was decided and which has since been recognized as an eminently sound doctrine is expressed in the following quotation: "Having elected to take the security at the value it possessed when the mortgage was originally executed, no change in value having since occurred, he [mortgagee] cannot be allowed to urge, to evade a compliance with the provisions of section 726, that it has become valueless." Applying this principle to the case at bar, it is scarcely necessary to state that if the security had no value at the time it was given, as plaintiffs allege, it could not have become less valuable thereafter.

Later cases have allowed suit to be maintained on a mortgage note, without foreclosure, after the sale of the mortgaged property and the absorption of all of the proceeds upon a foreclosure of a prior encumbrance. Savings Bank of San Diego County v. Central Market Co., 122 Cal. 28, 54 P. 273; Ferry v. Fisk, 54 Cal.App. 763, 202 P. 964; Cohen v. Marshall, 197 Cal. 117, 239 P. 1050.

A simple action on a note has been permitted where the mortgage was void for the reason that it lacked the signature of the mortgagor's wife (Powell v. Patison, 100 Cal. 236, 34 P. 677), and in cases where the property attempted to be mortgaged had no tangible existence at the time the mortgage was given. McPhee v. Townsend, 139 Cal. 638, 73 P. 584; Dyer Law & Collection Co. v. Abbott, 52 Cal.App. 545, 199 P. 340. And in Otto v. Long, 127 Cal. 471, 59 P. 895, 896, where a mortgage was given upon land in which mortgagor had no interest at all, an action on the note was allowed. It was pointed out in this case that to allow a suit on the note under

such circumstances is not a departure from the doctrine of Barbieri v. Ramelli, supra, nor the policy of the statute. The principle of these later cases is stated as follows: "If it can be made to appear that there is no such property as that which the mortgage purports to describe, it would demonstrate that there was no lien, and the debt would not be one secured by mortgage upon real estate," and it was said further: "It is not altogether or literally true, as declared in some of the cases, that the mortgagor only undertakes to pay the deficiency which may remain after the return is made of the result of the sale on foreclosure. He undertakes to pay the debt, but, if there exists a valid lien to secure its payment, the result is the same as though his contract had been only to pay the deficiency."

If, as plaintiffs allege, the security was without value when given they should have known it and they do not deny having such knowledge. Having taken the security advisedly, presumably knowing what they were doing, they made their contract with the mortgagors and they should be required to abide by it. They had a valid lien on the real property and the contract, in view of the provisions of the statute, made the debt collectible first through a sale of the property under foreclosure, and, if a balance remained unpaid, through the medium of a deficiency judgment. If, at the time the action was commenced, the mortgaged property had the same value that it had when the mortgage was given, plaintiffs are without right under their contract and under the statute to sue directly on the note. To allow such an action before either mortgage had been foreclosed would be to determine in the present action whether there might be a deficiency after the security was exhausted. That, we think, would be an unwarranted interference with the rights of the mortgagors under their contract. Values are uncertain and fluctuating. Real property which to-day may appear to have insufficient value as security for encumbrances thereon may, at a time when the securities are foreclosed, be of sufficient value to liquidate them in full. If mortgage security, although valid, have no value when given, or even though the title of the mortgagor be known to be questionable, the mortgagee should not have the right to accept the security and then waive it, thus converting the obligation into one which the mortgagor has not assumed. Therefore, the fact that the security of plaintiffs may never have had any value does not authorize the maintenance of this action or of the attachment issued therein, and the attachment should have been discharged. Pinkiert v. Kornblum, 5 Cal.App. 522, 90 P. 969.

[3] Plaintiffs attempt to rely also upon the allegation of their amended complaint that the security, after it was given, became valueless. We are of the opinion that the court did not find that the security originally had value which was subsequently lost. There was nothing before the court tending to prove this fact which could be correctly characterized as evidence. By their amended complaint and by the affidavit for attachment, plaintiffs made oath that the land was, at the time the mortgage was given, and at the time the action was filed, of less value than the amount of the prior encumbrance, and yet in the same breath they made the bald allegation that the security had become valueless. This latter allegation constitutes the entire so-called evidence offered to bring them within the terms of the statute which allows an attachment where the security has become valueless. No statement is to be found as to the value of the land when the mortgage was given nor as to the value of the security, if it had any. The only statement in the nature of evidence produced by plaintiffs as to the value at the time of the hearing of the motion was contained in an affidavit of one of plaintiffs' counsel, in which affidavit an officer of a corporation which held the first encumbrance was quoted as saying that an appraisement had been made by the corporation and that according to that appraisement the land was worth $700 or $800 less than the balance unpaid on the first encumbrance.

If, by their strangely contradictory sworn statements, plaintiffs have established the existence of any fact material on the motion to discharge the attachment, it is that the security was without value at the time it was given. Having thus established a fact which fails to support their right to an attachment, it would be intolerable that they should be allowed, by confessing the falsity of the allegations of their affidavit for attachment, to establish by their own self-impeached assertions, that they did receive good mortgage security which later became valueless.

The mere allegation that the property had become valueless is unsupported by even a scintilla of evidence and we are therefore reluctant to believe that the court refused to dissolve the attachment except upon the theory that it had been properly issued on a showing that the debt had never been secured. As the debt was shown to have been secured within the meaning of sections 726 and 537 of the Code of Civil Procedure, plaintiffs had no right to maintain the present action and therefore no right to the attachment.

[4] Plaintiffs correctly contend that the notice of motion to discharge the attachment was defective in failing to state the grounds of the motion. Code Civ.Proc., § 1010. The notice specified that it would be based on all of the pleadings and documents on file in the case. There was served with the notice the affidavit of defendant Salvador Ramirez, the substance of which has been heretofore stated. This affidavit sufficiently advised plaintiffs that the motion to discharge the attachment would be based in part upon the ground that the plaintiffs held mortgage security which had not been foreclosed and that they could not bring a simple action on the debt but must foreclose their mortgage. Furthermore, this question would have been presented to the court upon an inspection of the complaint. If we were considering the notice alone, the failure to specify the grounds of the motion would have furnished sufficient reason for the order denying the motion. The affidavit served with the notice was one of the documents upon which defendants were relying. The deficiencies of the notice were cured by the affidavit, the contents of which informed plaintiffs of the particular ground relied upon, which we have discussed. Where an accompanying affidavit cures defects in the notice, by disclosing to the adverse party the grounds upon which the motion will be made, the affidavit will be treated as a part of the notice and it will be held that the statute has been substantially complied with. Respondents, therefore, upon the hearing of the motion could not, and may not now rely upon the insufficiency of the notice. Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann.Cas.1915C, 737; Hecq v. Conner, 203 Cal. 504, 265 P. 180; Savage v. Smith, 170 Cal. 472, 150 P. 353; Quan Quock Fong v. Lyons, 20 Cal.App. 668, 130 P. 33; Powers v. Freeland, 114 Cal.App. 146, 299 P. 736.

The order refusing to dissolve the attachment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



11 Cal.App.2d 401

SAYLES v. PETERS et al.

SAYLES et al. v. SAME.

Civ. 5317, 5318.

District Court of Appeal, Third District, California.

Jan. 23, 1936.

1. Death ⇐30

Actions against operator of automobile for death resulting from accident, being an action for tort, abated upon operator's death (Civ.Code, § 1714¼).

2. Automobiles ⇐235

Where actions for death resulting from automobile accident were begun on day preceding death of operator, service on operator would be excused (Civ.Code, § 1714¼).

3. Automobiles ⇐235

Under statute imposing liability on owner of automobile for another's negligent operation and making personal service on operator contingent on possibility of service, owner's liability is not dependent upon possibility of personal service on operator (Civ.Code, § 1714¼).

4. Death ⇐30

Where actions for death resulting from automobile accident were brought against operator and owner and service on operator was impossible because of operator's subsequent death, death of operator did not bar actions against owner (Civ.Code, § 1714¼).

5. Action ⇐66

Generally, questions as to admissibility or sufficiency of evidence, presumption, and burden of proof are questions of remedy to be governed by law of forum.

6. Appeal and error ⇐1010(1)

If testimony is sufficient to support trial court's finding, judgment should be affirmed.

7. Automobiles ⇐244(23, 32)

Evidence that automobile was purchased, registered, and insured in wife's name, and

that she collected insurance after accident, *held* to show that wife owned automobile, and hence was liable for husband's negligent operation thereof, notwithstanding automobile allegedly was purchased and maintained with husband's earnings (Civ.Code, §§ 164, 1714¼).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Consolidated actions by Mamie Sayles and others against L. H. Peters and A. M. Peters. Defendant L. H. Peters died the day after the actions were brought, and plaintiffs proceeded to trial against defendant A. M. Peters. From judgments for plaintiffs, defendant appeals.

Affirmed.

Gerald M. Desmond and Stanley W. Reckers, both of Sacramento, for appellant.

Ralph H. Lewis, Wilson Craven, and Charles J. Hasman, all of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The above actions, being founded upon the same circumstances, were consolidated and tried as one, and are here presented upon one transcript and one set of briefs. The plaintiffs in both cases had judgments, from which judgments the defendant A. M. Peters appeals.

Prior to the 3d day of December, 1933, L. H. Peters and A. M. Peters were husband and wife, and residents of Carson City, Nev. On the 3d day of December, 1933, L. H. Peters died as a result of the automobile collision hereinafter referred to. The facts set out in the transcript, and as found by the trial court, are as follows:

That an automobile driven by Chester Sayles, the husband of Mamie Sayles, and father of James C. Sayles, Melvin H. Sayles, and Thelma R. Williams, collided with an automobile driven by L. H. Peters, the husband of the defendant, A. M. Peters. The collision occurred a short distance from the city of Sacramento, on the evening of November 24, 1933. The plaintiff Mamie Sayles was riding with her husband, Chester Sayles, at the time of the collision. In the car with L. H. Peters was one Henry Greer. As a result of injuries received in the collision, Chester Sayles died shortly thereafter. On the 3d day of December, 1933, as we have stated, as a result of the injuries received in the collision, L. H. Peters died. The defendant A. M. Peters, at the time of the collision, was at her home in Carson City, Nev. The car driven by L. H. Peters was registered in the name of A. M. Peters by the motor vehicle department of the state of Nevada; likewise, was insured in her name. The car was purchased after the marriage of L. H. Peters and A. M. Peters, and apparently was paid for out of the proceeds of an insurance business conducted by L. H. Peters. The action was prosecuted under the provisions of section 1714¼ of the Civil Code, based upon the allegation that the said A. M. Peters was the sole owner of the automobile driven by L. H. Peters, and that it was being driven with her permission. The court found A. M. Peters to be the owner of the automobile, and gave judgment upon evidence showing that L. H. Peters was solely responsible for the collision.

Upon this appeal it is contended by appellants that the cause of action against A. M. Peters was barred by the death of L. H. Peters; also, that the evidence shows that the automobile was community property of L. H. Peters and A. M. Peters; and that the testimony is not sufficient to justify the finding of the court that the automobile was the sole and separate property of A. M. Peters.

The actions were begun a few days before the death of L. H. Peters, but the record shows it was impossible to make service of summons upon L. H. Peters.

[1] Being an action for tort, the law seems to be well settled that so far as L. H. Peters was concerned, the actions died with his demise. In support of this statement we need only refer to the case of Singley v. Bigelow, 108 Cal.App. 436, 291 P. 899, and the cases there cited. That case, however, and the cases there cited, do not determine the question as to the liability of A. M. Peters.

Section 1714¼ of the Civil Code first provides that every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. The section then contains a limitation as to the amount of damages for which an owner may be liable. Following this limitation the section next specifies that the operator of the vehicle shall be made a

"party defendant provided personal service of process can be had upon said operator within this state, and upon recovery of judgment, recourse shall first be had against the property of said operator so served." The section then provides that the owner shall have the right of subrogation, and also contains provision in regard to the settlement of claims. The section itself from which we have quoted specifically provides that the operator of the car is to be made a defendant when personal service can be had upon him within this state, which excludes the idea that the owner is relieved from liability on account of the fact that personal service upon the operator cannot be had.

[2] In the instant case the record shows personal service could not be had upon L. H. Peters. The action was begun on the day preceding his death. Following the death of L. H. Peters the requirement of personal service, of course, falls to the ground just the same as though he were without the state. In other words, personal service upon L. H. Peters within this state is shown to have been impossible by reason of his death.

[3] The statute having made personal service upon the operator of the motor vehicle contingent upon the possibility of service, the conclusion necessarily follows that the liability of the owner is not dependent upon the possibility of personal service upon the operator of the car. It would seem that this question has been settled by the decisions in this state.

In Milburn v. Foster, 47 P.(2d) 1106, 1107, we find the following: "The liability of the defendant J. Arthur Foster is based upon section 1714¼ of the Civil Code. This liability is joint and several (Pascoe v. Payne, 124 Cal.App. 528, 531, 12 P.(2d) 1091; Broome v. Kern Valley Packing Co. (Cal.App.) 44 P.(2d) 430, hearing by the Supreme Court denied), except that the liability in so far as defendant owner is concerned, being created by statute, is limited to the amount fixed by statute. In cases which predicate liability of an owner defendant under this section when ownership of the automobile and permission to operate the same has been proved, the owner becomes directly liable for damage suffered in an amount limited by the statute, and this liability is direct and several, as well as joint, and is not dependent upon a judgment against the operator."

[4] In Broome v. Kern Valley Packing Co. (Cal.App.) 44 P.(2d) 430, a similar question was before the court, and it was there held (quoting from the syllabus): "Statutory liability of owner of automobile for injury resulting from negligence of person operating automobile with owner's permission may be secondary as between owner and such operator, but owner's liability is primary as between owner and party injured through operator's negligence, especially since statute provides that operator of automobile need not be made a defendant in all cases." A reading of the statute we think is sufficient to show that the contention of the appellants is not well taken, and that the cases we have cited are decisive of the question.

The next question is in regard to the sufficiency of the testimony to justify the finding of the trial court that the appellant A. M. Peters was the sole owner of the automobile at the time of the collision.

In addition to what we have stated, the testimony shows that the bill of sale made out by the seller of the automobile purported to transfer the title to the appellant in this action; that the automobile was registered in her name as legal owner thereof; that it was subsequently insured in her name, as the owner thereof; that after the collision to which we have referred the appellant, as the owner, collected the insurance thereon.

While the testimony of the appellant set out in the record is to the effect that the car was purchased with money earned in the business conducted by L. H. Peters, deceased, and taxes paid by him thereon, the following is also found in the record:

"Q. Why was this car when it was purchased placed in your name, Mrs. Peters? A. In the year 1932, in May, a friend of my husband fell down the cellar steps and was killed and his property was not turned over in his wife's name. It was not left in his wife's name and it worried Mr. Peters and he put all the property over in my name so in case anything happened to him why I would be protected.

"Q. After the property was put in your name did Mr. Peters continue to sell insurance? A. Yes, he did.

"Q. Did he continue to handle this money, the money that was received in the insurance business? A. Yes, he did. He always handled the money.

"Q. Did he continue to pay taxes on the real property? A. Yes, he did.

"Q. Did he continue to make these monthly payments of $40.00 on the automobile? A. Yes, he did.

"Recross-examination by Ralph H. Lewis, Esq., of counsel on behalf of plaintiffs herein:

"Q. Mrs. Peters, Mr. Peters turned the car over to you, transferred it to you and transferred the real property and everything so it would be your property when he died, isn't that true? A. Yes.

"Q. And in other words, he made what the lawyers call a gift of his property to you but he still retained the right to use it during his lifetime, isn't that right?

"Mr. Desmond: That is objected to upon the ground it calls for the conclusion and opinion of the witness.

"The Court: Yes, I think the objection to that is good.

"Mr. Lewis: Q. Mr. Peters told you at that time he made these separate transfers of the property that he was turning this over to you so that the title of the property would be in you and you would not have to probate the estate in case he died? A. Yes.

"Q. That was the whole purpose of it? A. Yes, Mr. Lewis. That is all."

According to the laws of Nevada, all property owned by the wife acquired by her before marriage or afterwards, by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, constitute her separate property. Comp.Laws Nev. § 3355. The statutes of Nevada also provide: "All other property acquired, after marriage, by either husband or wife, or both," with certain exceptions, "is community property." Section 3356. The laws of Nevada also provide that property acquired after marriage by husband and wife, or either, is presumed to be community property, and that it can only be shown to be separate property by clear and satisfactory testimony. Based upon these references to the laws of Nevada, it is contended by the appellant that the automobile involved was community property and that L. H. Peters was operating the same as an owner thereof, being entitled to its exclusive use and control. In support of this contention appellant cites the case of Milisich v. Hillhouse, 48 Nev. 166, 228 P. 307, being a case where the question as to the ownership of an automobile alleged to be separate and community property was involved. On the part of the sheriff it was alleged to be community property; on the part of the plaintiff it was alleged to be separate property. A reading of that case shows that the circumstances there involved are readily distinguishable from the circumstances presented for our consideration. In the Hillhouse Case the automobile was registered in the name of the husband as the owner, and the court in that case held, notwithstanding the testimony of the plaintiff, that the car was given to her, the circumstances relating to the registration, insurance, etc., sufficient to justify the trial court in concluding that the automobile was community property, and therefore liable for the husband's indebtedness. In the instant case the bill of sale for the automobile purported to transfer the title to the appellant. The registration was in her name as the owner thereof, and the insurance appears to have been in her name as the owner thereof; that she collected the insurance; that under the testimony which we have set forth herein, title not only to the personal property but to certain real estate was transferred to the appellant so that she could escape probate proceedings. The appellant acted in pursuance of the arrangement made by the husband, transferring title to her as the owner thereof. Upon the trial court devolved the duty of weighing the effect of her words as against the effect of her acts, in determining the ownership of the automobile.

A considerable portion of the briefs are devoted to the question as to whether the court followed the presumption that property acquired after marriage was community property unless shown by satisfactory evidence to be separate property under the laws of the state of Nevada, or followed the presumption of section 164 of our Civil Code. We find nothing in the record indicating that the court gave precedence to either presumption. We may state that the laws of Nevada are the same as in this state requiring every owner of a motor vehicle to have the same registered with the motor vehicle department of the state, and it is made the duty of the officers to examine into the regularity and genuineness of the application for registration "in order that every certificate issued for a vehicle shall contain true statements of the ownership thereof." Comp. Laws Nev. § 4435.06.

Irrespective of the law which relates to what is called the lex loci and the lex fori, if the testimony introduced was sufficient to justify the trial court in coming to the conclusion that the appellant A. M. Peters was satisfactorily shown to be the owner of the automobile, it would fulfill the requirements

both of the laws of the state of Nevada and of the state of California.

[5, 6] In 78 A.L.R. p. 884, we find the following general statement: "Generally, questions of evidence as, for instance, its admissibility, sufficiency, etc., are regarded as purely questions of remedy to be governed by the law of the forum, and the question of presumption and burden of proof is, at least by the weight of authority, ordinarily regarded as subject to the same rule." We do not need to quote further, but this statement is supported by a long list of authorities. Thus, if under our laws, the testimony is sufficient to support the finding of the trial court, the judgment should be affirmed.

In the case of Hammond v. Hazard, 40 Cal.App. 45, 180 P. 46, we find the following (quoting from the syllabus): "The Motor Vehicle Act (Stats. 1913, p. 641, secs. 3, 4), requiring the owner of every automobile to cause an application for registration to be filed in the name of the owner, warrants a finding that the person in whose name an automobile is registered is in fact the rightful owner." In support of this statement the court there cites Commonwealth v. Sherman, 191 Mass. 439, 78 N.E. 98; Ferris v. Sterling, 214 N.Y. 249, 108 N.E. 406, Ann.Cas.1916D, 1161, and note on page 1163.

The same question was before the court in the case of DePuy v. Shay, 127 Cal.App. 476, 16 P.(2d) 158.

[7] In Re Estate of Nelson, 104 Cal. App. 613, 286 P. 439, 442, this court, speaking through Justice Thompson, said: "If a conveyance of real property is made from a third party to the wife with the husband's knowledge and consent, the property is deemed to be her separate property" (citing a number of authorities). Then following: "The intention must be inferred from the surrounding circumstances, declarations, and conduct of the parties at the time of the transfer" (citing a number of authorities). And, further: "Where the conveyance is made from a third person to the wife with the knowledge of the husband, regardless of whether it is paid for from the community funds or from his separate funds, in the absence of fraud or undue influence, it will be presumed to have been intended as a gift." This language appears to have been used in relation to transfers of title to real estate. However, we do not perceive any distinction in principle between a transfer to real estate and a transfer to personal property where the title is taken in the name of the wife, the law requiring that the application for registration shall be made by the owner, insurance taken out by the one whose name appears upon the registration to be the owner, and the insurance collected by such person, the finding of the trial court as to the ownership of the person so acting would seem to be well supported.

To the same effect is the case of Perry v. A. Paladini, Inc., 89 Cal.App. 275, 264 P. 580.

Other cases might be cited, but what we have said we think sufficient to show that the appellant's contentions are not well founded, and that the testimony in the record, and the acts of the appellant thereby shown to have taken place, amply support the findings of the trial court. No other grounds for reversal are assigned.

The judgments are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



11 Cal.App.2d 576

PEOPLE v. RUBENS et al.*

Cr. 1448.

District Court of Appeal, Third District, California.

Feb. 1, 1936.

Rehearing Denied Feb. 15, 1936.

Hearing Denied by Supreme Court March 2, 1936.

1. Criminal law ⇐1023(8)

Order denying motion to arrest judgment is not appealable (Pen.Code, § 1237).

2. Conspiracy ⇐43(1)
False pretenses ⇐26
Licenses ⇐42(3)

Indictment for grand theft, conspiracy, and for violation of Corporate Securities Act by selling an interest in an oil and gas lease without a permit from the commissioner of corporations *held* sufficient to charge an offense (Pen.Code, §§ 950–952; St.1917, p. 673, as amended by St.1931, p. 950).

Indictment alleged in each count that defendants on specified date willfully and knowingly authorized and aided in issue and sale to designated persons of security

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 54 P.(2d) 1107.

of their own issue as defined in Corporate Securities Act, to wit, "a certain certificate of interest in an oil and gas lease" on specifically described property without permit from corporation commissioner.

3. Licenses ⇐18½

Option to purchase oil and gas lease assignment representing fractional interest in leases and entitling purchaser to pro rata proportion of net proceeds derived from sales of oil and gas produced on designated tract *held* "security" or "certificate of interest in oil enterprise" within Corporate Securities Act requiring permit from corporation commissioner for sale thereof (St.1917, p. 682, § 18, as amended by St.1931, p. 950).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

4. Criminal law ⇐398(1)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuance of certificate of interest in oil and gas lease without permit, true copies of written instrument representing assignment of interest complained of *held* admissible where original documents were in possession of defendants and defendants admitted that documents offered were exact copies of originals (St.1931, p. 938, § 2 (a) (7–9); Pen.Code, § 182).

5. Criminal law ⇐829(3)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuing and selling certificates of interest in oil and gas lease without permit, instructions as to meaning of "security" and "certificate of interest" within Corporate Securities Act with reference to oil and gas lease assignments *held* properly refused as misleading in view of instruction properly defining terms as used in act (Pen.Code, § 182; St.1917, p. 673, as amended by St.1931, p. 950).

6. Criminal law ⇐1186(4)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuing and selling certificates of interest in oil and gas lease without permit, pronouncement of sentence in less than two days after rendering of verdict *held* not reversible error where no reason for delay was suggested by defendants when judgment was pronounced, since time for pronouncing sentence is not jurisdictional, and no prejudice resulted from premature sentence (Pen.Code, §§ 182, 1191; St.1917, p. 673, as amended by St.1931, p. 950; Const. art. 6, § 4½).

7. Criminal law ⇐1170(1)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in selling certificates of interest in oil lease without permit, exclusion of rebuttal evidence as to fraudulent representations concerning nature of soil as oil producing *held* reversible error, in view of evidence that defendants were misled into believing that transactions were under jurisdiction of real estate commissioner rather than corporation commissioner (Pen.Code, §§ 182, 184; St.1917, p. 673, as amended by St.1931, p. 950; St. 1919, p. 1252, as amended; Const. art. 6, § 4½).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Si Rubens, F. L. Appleton, and Gregory Linder were convicted of grand theft, conspiracy to commit a crime, and violation of the Corporate Securities Act, and they appeal.

Reversed and remanded.

For prior opinion, see 52 P.(2d) 274.

Frank G. Warren, of Stockton, and Lester R. Godward, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from judgments of conviction of several separate counts of an indictment for grand theft, conspiracy to commit a crime under section 182 of the Penal Code, and for violation of the Corporate Securities Act (St. 1917, p. 673, as amended) in issuing and selling to various named individuals certificates of interests in an oil and gas lease without securing from the corporation commissioner of California a license therefor. These defendants also purport to have appealed from an order denying their motion in arrest of judgment.

It is asserted each of the counts of the indictment fails to specifically allege facts sufficient to constitute a public offense; that the evidence fails to support the verdict and judgment chiefly because the documents upon which the prosecution relies in support of the judgment are mere options for the purchase of an interest in real property and on the contrary that they are not certificates of interest in and oil and gas lease; that the court erred in excluding evidence intended to rebut a showing of fraudulent representations respect-

ing the condition of the oil wells which are involved in the transaction; that the court erred in giving and refusing certain instructions and in pronouncing sentence in less than two days after the rendering of the verdict contrary to the provisions of section 1191 of the Penal Code.

[1] The statute does not authorize an appeal from an order denying an arrest of judgment. Section 1237, Pen.Code; People v. McCalla, 63 Cal.App. 783, 220 P. 436; People v. Jackson, 138 Cal. 462, 71 P. 566. Section 1237, supra, provides that a defendant may appeal, only, from a final judgment of conviction, from an order denying a motion for new trial, and from an order made after judgment. It is obvious that an order denying a motion in arrest of judgment is necessarily made before and not after judgment is rendered. The purported appeal from the order denying defendants' motion to arrest the judgment is therefore dismissed.

[2] We are of the opinion each count of the indictment states facts sufficient to constitute the offense with which it purports to charge the defendants. People v. Ratliff, 131 Cal.App. 763, 22 P.(2d) 245; People v. Main, 75 Cal.App. 471, 242 P. 1078. Each count is couched in clear and concise language describing the public offense with which the defendants are charged. Each count conforms to the provisions of sections 950, 951, and 952 of the Penal Code. The chief challenge to the sufficiency of the allegations of the indictment refers to an alleged failure to specify facts constituting the particular charges of issuing and selling certificates of interest in the oil lease contrary to the inhibition of the Corporate Securities Act so as to enable the defendants to plead former conviction of such transactions in any subsequent prosecution therefor. The indictment, as amended, alleges in each count that the defendants, on a specified date "did willfully, unlawfully and knowingly authorize, direct and aid in the issue and sale of, and did issue, execute and sell, and cause, and assist in causing to be issued, executed and sold for value to" individuals who are named therein, "a security of their own issue, as defined in said Corporate Securities Act, to-wit: A certain certificate of interest in an oil and gas lease" on specifically described real property in Sacramento county, "without first having applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do." This is a sufficient allegation of facts constituting the public offense prohibited by the provisions of section 18 of that act. St. 1917, p. 673, 2 Deering's Gen. Laws, 1931, p. 1924, Act 3814, and amendments thereto. There is no merit in the contention that the indictment fails to state facts sufficient to constitute the public offenses against the defendants which are sought to be charged therein.

There appears to be nothing in the cases of People v. Mahony, 145 Cal. 104, 78 P. 354, People v. McKenna, 81 Cal. 158, 22 P. 488, or People v. Lamanuzzi, 77 Cal. App. 301, 246 P. 557, upon which the appellants rely, in conflict with the preceding determination as to the sufficiency of the allegations of the indictment.

[3] There is a conflict of evidence regarding many issues of the case. The evidence, however, satisfactorily shows that the defendant Si Rubens owned an oil lease on 1,283 acres of land in Sacramento county, which land is described in the indictment, authorizing him to prospect for, sink wells, and produce oil and gas from the property upon terms which are expressed therein; that he sold the interests in the enterprise under the fictitious name of Capitol Lease Development Company and operated the oil developing business in the name of the Great American Petroleum Company, a corporation having 25,000 shares, of which he was president and manager and owned all but 2 shares thereof; that the other appellants, Appleton and Linder, were agents and salesmen of the enterprise who knowingly participated in the illegal sales of the certificates of interests complained of; the defendants solicited customers and for a consideration sold interests in the oil-producing project; upon payment to the defendants of the sum of $17.50 by the respective purchasers named in the indictment, a document was executed and issued to each by the Capitol Lease Development Company, as seller. This document is termed an "option to purchase oil and gas lease assignment." It purports to give to the vendees an "option to purchase oil and gas lease assignments of [an undivided] five sixty-fourths (5/64) of an acre" of the 1,283-acre tract of land, but failed to describe the allotted portion thereof. It contains a provision that within thirty days from the "bringing in" of the first well on the entire tract of land, the purchaser shall

pay an additional sum of $30, entitling him to a community lease for his proportionate interest in the entire project. A copy of the proposed community lease was set out in full and attached to the so-called option. This option provides for the drilling of five oil wells on each purchaser's property by the Great American Petroleum Company, under specified terms and conditions, which procedure is designated therein as "a part of a proposed drilling program that calls for the drilling of a well to each ten (10) acres on the above-described property, until the total of one hundred and twenty-eight (128) wells shall have been completed" on the entire property. The so-called option then stipulates that the Great American Petroleum Company will, upon completion of the contracts to purchase the assigned interests, execute to each of the purchasers a "community lease" for his proportionate interest in the entire project on a participating basis in the profits of the enterprise as follows: 12½ per cent. thereof "to landowners"; 15 per cent. "to the sublessors"; 22½ per cent. "to the Great American Petroleum Company"; and 50 per cent. "divided among the separate lease holders entering into the community lease agreement, in the same proportion as each leaseholder's holdings bears to the full number of lease parcels contained in the community lease." A bank was then named as trustee to receive and distribute to the shareholders the funds derived from the enterprise in accordance with the provisions of the contract.

Attached to the so-called option above referred to was the detailed form for the proposed community lease to be issued by the Great American Petroleum Company, which, in effect, is a contract making each purchaser a pro rata shareholder in the oil-producing enterprise in the entire 1,283-acre tract of land. It provides that all interests in the project "shall nevertheless be developed and operated as one lease"; that "the assignee and separate assignors herein are to bear production and marketing costs of entire production in proportion that the interest bears to the entire lease"; that a designated bank shall act as trustee to receive and distribute to the respective shareholders the proceeds of the enterprise in the proportions heretofore specified. The Great American Petroleum Company covenanted to operate the enterprise and sink a maximum number of 128 wells pursuant to the agreement and to promptly account for all proceeds therefrom.

We are satisfied the transaction above related amounts to sales or offers of sales of pro rata participation interests in an oil and gas-producing enterprise to be operated by the lessor, evidenced by written instruments in the nature of certificates of participating interests or securities therefor, in direct violation of the Corporate Securities Act of California. Each unit or share represents a 5/64 undivided portion of an acre and upon completion of the first well and the payment of the total sum of $47.50 the purchaser is entitled to his stipulated pro rata proportion of the net proceeds derived from sales of all the oil and gas produced from all the wells on the entire tract of 1,283 acres of land.

Section 18 of the Corporate Securities Act (St. 1917, p. 673, as amended by St. 1931, p. 950) provides that:

"Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, * * * contrary to the provisions of this act, * * * or who, with knowledge that any security has been issued or executed, in violation of any of the provisions of this act, sells, or offers the same for sale, * * * or who, in any respect, wilfully violates or fails to comply with any of the provisions of this act, * * * or who with one or more other persons conspires to violate * * * any of the provisions of this act, is guilty of a public offense and shall be punished."

The term "security" is defined in section 2(a), subd. 7, of the same act (St. 1917, p. 673, as amended by St. 1931, p. 938), as follows:

"The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings."

Under circumstances very similar to those which exist in the present case, it was determined in the recent cases of People v. Craven, 219 Cal. 522, 27 P.(2d) 906, and Domestic & Foreign Petroleum Co.,

Ltd., v. Long (Cal.Sup.) 51 P.(2d) 73, that contracts which were called "grant deeds" assigning undivided interests in oil and gas leases entitling the holders thereof to participate in the proceeds of the petroleum produced by the vendor from the land were in fact "securities" within the meaning of the Corporate Securities Act which are prohibited from being transferred or sold without first procuring a permit therefor from the corporation commissioner. In the last-mentioned case it was contended, as it is in this case, that the challenged instrument was called a deed and was in the nature of a deed containing the significant language that the leasehold interest in land was thereby "granted and conveyed" and, on the contrary, that it was therefore not a "security" for an interest in an oil enterprise. The court said in that regard:

"It is the contention of defendants that the lessees herein did not issue a security, but granted undivided interests in the leasehold estate, which leasehold is an estate in real property, or in the oil to be produced therefrom; that the instruments of transfer are entitled 'grant deed,' and use the words 'grant' and 'convey,' which are appropriate to a deed rather than to a certificate of interest or a security. The contention that the interests are not securities is fully answered by our decision in People v. Craven, 219 Cal. 522, 27 P. (2d) 906, 907. * * * The decision fully sustains the constitutionality of the provisions of the Corporate Securities Act which require an individual to obtain a permit to issue securities as applied to an individual oil lessee who assigns oil interests such as those in the Craven Case and in the case now before us. * * *

"Instruments such as those in the Craven Case and the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise or venture to be conducted by others. * * *

"In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share."

The preceding language of the Supreme Court is peculiarly applicable to the facts of the present case and conclusively answers adversely to them the very contentions made by the defendants on this appeal.

Assuming that the assignments of interests or securities which were sold in this case were all actually owned by the defendant Rubens and that they were therefore securities "of his own issue," as the indictment alleges, the other defendants Appleton and Linder, who aided, assisted, and conspired to unlawfully sell and transfer these interests contrary to the Corporate Securities Act would also be guilty as principals in the transaction. Sections 31 and 971, Pen. Code. Moreover, the Corporate Securities Act specifically makes an agent or employee guilty as a principal who unlawfully solicits sales or sells securities without a license so to do. Section 2 (a), subdivisions 8 and 9 of the act (St. 1917, p. 673, as amended by St. 1931, p. 938), provide that:

"'Sale' or 'sell' shall also include a contract of sale, * * * an option of sale, a solicitation of a sale, * * * directly or by an agent. * * *

"9. The word 'agent' means and includes every person or company employed or appointed by a company or broker or any other person who shall, within this state, either as an employee or otherwise, for compensation, sell, offer for sale, negotiate for the sale of or take subscriptions for any security."

Upon the authorities of People v. Craven and Domestic & Foreign Petroleum Co. v. Long, above cited, it is clear that the so-called options or assignments of interests in the oil enterprise to be conducted by the Great American Petroleum Company, which was managed, controlled and almost exclusively owned by the defendant Si Rubens were in effect securities or certificates of interests in the oil enterprise, the issuing and sales of which are prohibited by the Corporate Securities Act until a license to do so has been first procured. These securities were therefore sold and transferred in violation of the act.

[4] It was not error for the court to admit in evidence true copies of the written instrument representing the assignment of interests complained of, for the reason that the defendant Rubens admitted that they were exact copies of the original documents. In response to the following question: "I will show you an instrument marked 'Assignment and Agreement, East Coyote Hills,' and ask you if that is a duplicate form used in this development, with the exception of the words 'Coyote Hills'?" he replied: "A. And with the exception of 'Coyote Hills.'" Mr. Atherton, one of the defendants' attorneys, also stipulated that the copy of the community lease which was attached to the option for assignment was a true copy of the original. It was conclusively proved that the original documents were in the possession of the defendants. Mr. Bailey testified that the original instruments were taken by the defendants and remained in their possession. The language of these instruments was not disputed at the trial. Having shown that the original instruments were not available, but, on the contrary, that they were in the possession of the defendants, the true copies thereof were competent evidence. People v. Chapman, 55 Cal.App. 192, 203 P. 126, 130; People v. Jarvis, 135 Cal.App. 288, 311, 27 P.(2d) 77; 16 C.J. p. 616, § 1219. In the Chapman Case, supra, it is said in that regard:

"It is axiomatic that the court cannot compel the defendant in a criminal case to produce any incriminating writing. It is for this reason that, ordinarily, the prosecution may give secondary evidence of the contents of an incriminating document whenever it appears prima facie that it is in the possession of the accused."

[5] The court did not err in refusing to give an instruction which was offered by the defendants to the effect that although the purchaser of a lease of land may expect thereby to derive a profit from his investment, the instrument may not be deemed to constitute a security or certificate of interest in an oil enterprise in contemplation of the Corporate Securities Act, the issuing or sale of which is prohibited, until a license therefor has been first procured. Nor did the court err in refusing to give the following instruction:

"You are instructed that a deed to, a lease of, an assignment of interest in or an option to purchase a lease or an interest in oil land is not in itself a security as defined in the act of the Legislature of the State of California, approved May 18, 1917, Statutes of 1917, page 673, as amended and known as Corporate Securities Act."

It is contended these instructions are proper and should have been given to the jury on the authority of People v. Steele, 2 Cal.App.(2d) 370, 36 P.(2d) 40, 42, Callahan v. Martin (Cal.Sup.) 43 P.(2d) 788. We think not. These instructions have no application to the facts of the present case. They are misleading and were properly rejected. The distinction between the facts of the Steele Case, supra, and the present action is very clear and vital. In that case, Steele was the owner of a certain placer mining claim and machinery. The prosecuting witness Dunn leased this claim and machinery for a period of two years in consideration of the sum of $250 for the purpose of operating the claim as a mining enterprise solely by his own efforts. He agreed to pay the owner of the claim a large percentage of whatever proceeds he derived from the mining enterprise. The lessor had no part in or obligation to perform any service in connection with the proposed enterprise. The court clearly says in that regard:

"In the case now before us, the agreement contemplates no return on the money invested, other than the right to use certain property, and any anticipated profits could come only through the proceeds of operations to be conducted by the appellant himself."

Under such circumstances there could be no violation of the Corporate Securities Act by merely leasing the land for the lessee to conduct his own independent enterprise thereon. This distinction is also recognized in the recent case of Domestic & Foreign Petroleum Co. v. Long, supra, from which we have heretofore quoted. In the present case the challenged instrument does create an interest by assignment in an oil-producing enterprise to be operated and conducted by the defendants alone. Nor are the facts of the Callahan Case applicable to this case. The question of a violation of the Corporate Securities Act was not involved therein. Since the submission of this case, the Domestic & Foreign Petroleum Co. Case, upon which the appellants rely, has been decided by the Supreme Court on hearing from the District Court of Appeal, 42 P.(2d) 1085, and regardless of whether it be deemed that such a lease creates an interest in real

property or not, it has been definitely determined that the transfer of such a document creating an interest in the proceeds of an oil enterprise to be conducted by the lessor or assignor, is deemed to be in the nature of a security or certificate of oil interest within the meaning of those terms as they are used in the Corporate Securities Act.

The jury was clearly and properly charged in several instructions regarding the essential elements constituting the terms of "a security" and "a certificate of oil interest" as they are used in the Corporate Securities Act. The court was authorized to determine as a matter of law and to instruct the jury regarding the legal effect of the terms of the challenged "option to purchase oil and gas lease assignment." People v. McCalla, 63 Cal.App. 783, 789, 220 P. 436. But the court did not do so. It was very cautious, very clear and very fair in instructing the jury regarding the effect of the instruments which are involved on this appeal. We are satisfied there was no error committed in giving to the jury or refusing instructions.

[6] Finally it is contended the court erred in pronouncing sentence upon the defendants in less than two days after the rendering of the verdict of conviction, contrary to the provisions of section 1191 of the Penal Code. It is true the verdict of the jury was rendered in this case on June 11, 1935. Judgment was inadvertently pronounced on June 13, 1935. The defendants, with their counsel, were present in court and were asked if they had any reason to suggest why judgment should not then be pronounced against them. No reason for delay was then suggested. Neither the defendants nor their attorneys replied to the inquiry of the court. No objection was made to the pronouncing of sentence at that time. The defendants waived their right to object to the failure to pronounce sentence within the time prescribed by statute. The time for pronouncing sentence in a criminal case is not jurisdictional. No prejudice resulted from the premature sentence. It has been uniformly held that in the absence of a showing of prejudice therefrom the failure to strictly comply with the provisions of section 1191 of the Penal Code with respect to the time for pronouncing sentence is not reversible error. People v. Zuvela, 191 Cal. 223, 215 P. 907; People v. Stroff, 134 Cal.App. 670, 26 P.(2d) 315; People v. Kloss, 130 Cal.App. 194, 19 P.(2d) 822; People v. Powell, 83 Cal.App. 62, 256 P. 561; People v. Haines 64 Cal.App. 628, 222 P. 183. The time for pronouncing sentence in a criminal case is merely procedural in its nature. Under the provisions of article 6, § 4½, of the Constitution, a failure to comply strictly with the provisions of section 1191 of the Penal Code in imposing sentence is not reversible error unless it results in a miscarriage of justice.

[7] Upon rehearing our attention is called to the erroneous rejecting of the testimony of six witnesses offered by the defendants to rebut the testimony of the prosecution concerning alleged fraudulent statements made by the defendants regarding the nature of the soil and the prospects of striking oil on the land of the Capitol Lease Development Company called the "Coyote Field," and the "Clay Field," as inducements for the purchasers of interests therein to part with their money which was paid therefor. In rejecting this rebuttal evidence the court erroneously held that the question of fraud was not involved in the case. It said: "I think it's collateral matter, entirely outside the issues of this case, whether there is oil there. There may be millions and billions of gallons, but that has nothing to do with whether or not these people were selling securities without a permit."

Over the objections of the defendants, six witnesses were permitted to testify for the prosecution to alleged false and fraudulent statements made to the purchasers of interests in the oil enterprise to the effect that the soil in question indicated the presence of oil; that they had already struck "oil sand" and gas with a pressure that nearly blew the pipe and drill out of the well; that the formation indicated the producing of at least 600 barrels of oil a day; that the conditions resembled the famous Kettleman Hills oil fields; and that the purchasers were urged to buy their shares promptly as the price would certainly advance. At least one of these witnesses testified that he relied on these statements and was induced thereby to purchase his shares. Lloyd Adams said in that regard: "Anyone knows the Kettleman Hills' formation is an oil-producing formation, and when anyone states they are drilling a well going through a Kettleman Hills' formation naturally carries great weight."

Mr. Adams, who was called by the prosecution, testified over objection that he was

told by the defendants that the property contained cretaceous soil of good oil formation. Mr. De Vinny said that Appleton told him about the gas pressure which they had struck "which was a very good indication of oil." Mr. Burchfiel testified that Sidebotham, the sales manager of the oil enterprise told him "they were now in the oil sand" and that they had better buy their shares quickly before the price advanced. This witness also testified that Appleton said: "We have oil at Clay. * * * We have a core taken from that oil sand, * * * some oil extracted from that sand * * * (that) would produce approximately * * * six hundred barrels per day." Dorothy Clesen testified that Mr. Rubens told her they were then "in proven oil fields," and that the gas pressure was so great "they couldn't drill any further, that the well would blow in."

To rebut this evidence which was offered for the purpose of showing that, to induce the purchase of shares, the defendants made fraudulent and false statements to the purchasers thereof with relation to the nature of the soil, the presence of gas and oil, and the prospects of producing good commercial oil wells, the defendants called Mr. Furber, a graduate geologist of considerable experience, and one other witness, to testify that the soil in question was first-class oil-producing formation; that the prospect of striking oil in commercial quantity was good; and that they had actually produced oil in the well in question. Mr. Grabel was asked in that regard: "Q. Do you know whether or not * * * any oil was ever encountered in the well at Clay?" To the questions propounded to these witnesses for the purpose of rebutting the testimony of the prosecution concerning alleged false and fraudulent representations, the court sustained objections thereto on the theory that the element of fraud was not involved in the charges of illegally selling certificates of shares in the oil enterprise without first procuring a license from the corporation commissioner of California. The court overlooked the competency of the issue of fraud in the charges of grand theft. The defendants then offered to prove similar facts by four or five other witnesses, to which testimony the court also sustained objections on the same grounds.

The rejecting of this evidence constituted prejudicial error. It was competent to show the actual conditions which existed in the oil field to rebut, if possible, the alleged false and fraudulent statements of the defendants regarding the nature of the soil and the prospects of producing oil in commercial quantity, and to disprove the element of fraudulent representations in securing the money of the purchasers of certificates of interest in the oil enterprise on the charges of grand theft of which they were also convicted.

The learned trial judge evidently overlooked the fact that the defendants were being tried upon several counts of grand theft, as well as other counts of illegal sales of certificates of interests in the oil enterprise without the license of the corporation commissioner. The element of fraud was included in the charges of grand theft, with which the defendants were accused. Section 484 of the Penal Code provides in part: "Every person who shall * * * knowingly and designedly, *by any false or fraudulent representation or pretense,* defraud any other person of money, labor, or real or personal property, * * * is guilty of theft."

It is apparent that the preceding evidence adduced by the prosecution must have convinced the jurors that the defendants were guilty of grand theft because they had induced the purchasers of shares to part with their money by falsely representing to them the land in question contained good oil-producing soil; that they had already encountered gas pressure, oil sand, and a quantity of oil which assured the development of oil in commercial quantity. Any evidence which tended to prove that these statements were true or that the defendants were not guilty of false or fraudulent representations in procuring the money from the purchasers of the shares was competent. The exclusion of the defendants' rebuttal evidence on that issue was therefore erroneous.

We are persuaded that the evidence of the prosecution of the foregoing alleged false representations, and the exclusion of all evidence tending to rebut the same not only induced the convictions of the defendants of the counts of grand theft, but that such conduct also prejudiced the jurors in arriving at their verdicts of guilty of the other counts of unlawfully selling the shares without a license so to do and the counts charging defendants with conspiracy to commit a crime under section 182 of the Penal Code.

After a careful reading of the entire record on rehearing, we are unable to say that, in spite of the errors above referred to,

the convictions of the defendants were not a miscarriage of justice. The sale of the certificates of interest in the oil enterprise without the license of the corporation commissioner was a violation of the Corporate Securities Act of California. It appears, however, that Mr. Rubens believed that the transactions involved only an interest in real property, and that the real estate commissioner of California had sole jurisdiction of the issuing of licenses therefor; that Mr. Rubens did submit the proposed sales project to the real estate commissioner who instructed him to go ahead with the sales; and that he would be notified before any action was taken if it was deemed to be necessary for him to first procure a license for such sales, but that he was never notified of that requirement. In other words, there is some evidence that the defendants were misled into believing that the transactions in question were under the lawful jurisdiction of the real estate commissioner pursuant to statutes of 1919 (Stats. 1919, p. 1252, and amendments thereof; Act 112, vol. 1, Deering's Gen. Laws of 1931, p. 25) and not subject to the Corporate Securities Act.

The judgments are reversed, and the cause remanded for new trial.

We concur: PULLEN, P. J.; PLUMMER, J.

5 Cal.2d 317

SKINNER v. CITY OF LOS ANGELES.

L. A. 14963.

Supreme Court of California.

Feb. 10, 1936.

1. Eminent domain ⇐277

Claim for damages resulting from change of grade of street *held* properly filed with city council rather than with board of public works.

2. Appeal and error ⇐1010(1)

Appellate tribunal cannot interfere with trial court's finding supported by evidence.

3. Evidence ⇐471(26)

Generally, ownership of property is fact to which witness may testify.

4. Eminent domain ⇐300

Evidence *held* to sustain finding that plaintiff, suing for damages resulting from change of grade of street, was owner of damaged property.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by T. G. Skinner against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion of the District Court of Appeal, Second District, see 44 P.(2d) 467.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Charles F. Reiche, and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

E. H. Delorey, of Los Angeles, for respondent.

Young, Lillick, Olson & Kelly, of Los Angeles, amicus curiæ.

THOMPSON, Justice.

The plaintiff in this action recovered a judgment against the defendant city for damages done to property adjacent to Third street by the grading of that street in accordance with plans and specifications therefor adopted by the city council. The defendant presecutes this appeal and urges but two reasons why the judgment should be reversed: (1) The claim for damages, having been filed with the city council instead of with the board of public works, was insufficient; and (2) the evidence of ownership of the property involved is insufficient to support the finding on that issue.

[1] Under the two recent cases of Douglass v. City of Los Angeles (Cal.Sup.) 53 P.(2d) 353, and Cottle v. City of Los Angeles (Cal.Sup.) 53 P.(2d) 361, the general rule is that claims for damages resulting from tortious actions are to be filed with the city council. It does not appear that the claim here involved is outside the general rule.

[2-4] With respect to the contention that the finding of ownership of the property by plaintiff is not supported by the evidence, Mr. Skinner testified in effect that he owned the property; that he acquired it in 1923, but took title to it in the name of his partner, Dr. Holm; that it stood thus of record until August, 1932, at which time Holm and Bertha E. Holm quitclaimed it to plaintiff's son T. S. Skinner; that T. S. Skinner conveyed a portion of the property facing on Loma drive to L. A. North; and that L. A. North conveyed to Mary S. Covert. He further testified that his son had conveyed to him although he did not know whether the deed had been placed of record. The grading was done December 3, 1931. The defendant introduced deeds which showed the record title

to have been taken by P. F. Holm on May 24, 1923, and transferred by him and his wife to T. S. Skinner on August 15, 1932. It also produced deeds of the transfer from T. S. Skinner of that portion facing on Loma drive (the property being in the shape of an L and extending along two sides of the corner lot) to L. A. North on August 24, 1932, and by L. A. North to Mary Covert. The plaintiff also testified that he had paid the taxes since 1923. The court, evidently feeling the uncertainty of the testimony with respect to the ownership, and in accordance with a statement by plaintiff and in a memorandum opinion signed by the trial judge, stayed the execution of the judgment until plaintiff furnished defendant "appropriate releases from all owners of the property of record as of the date of the actual making of the Act, December 3, 1931." Regardless, however, of the unsatisfactory nature of the evidence and the unusual procedure taken to protect the appellant against action by the record holder of title, it must be held that the appellate tribunal cannot interfere with the finding of the trial court. It has been held that the ownership of property is, as a general rule, a fact to which a witness may testify. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190. Hence the testimony of plaintiff as we have recited it is sufficient to support the finding, and the judgment must be upheld.

Judgment affirmed.

We concur: WASTE, C.J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

5 Cal.2d 278

METZLER v. FOSTER HOLDING CO.

Sac. 4952.

Supreme Court of California.

Jan. 30, 1936.

Rehearing Denied Feb. 27, 1936.

1. Assignments for benefit of creditors ⇐ 14(1)

Chattel mortgage on crops given by lessee to creditor to secure debts owed to several creditors, in an amount considerably less than total value of crops belonging to lessee, *held* not void as an attempted assignment for benefit of creditors (Civ.Code, §§ 3432, 3440, 3459).

2. Chattel mortgages ⇐ 48

Description in chattel mortgage on crops which was sufficient to put third parties on inquiry to identify property covered *held* sufficient as against lessor who, knowing what property was mortgaged, applied mortgaged crops to cover rental due it.

3. Chattel mortgages ⇐ 52

Chattel mortgage on crops given by lessee which was slightly in excess of amount of indebtedness secured *held* not void as action against lessor who applied mortgaged crops to rent owned by lessee, where no fraud appeared.

4. Chattel mortgages ⇐ 229(1)

In mortgagee's conversion action against lessor who applied mortgaged crops of lessee to payment of rent due lessor, allowance of attorney's fees to mortgagee *held* improper, since conversion action was not within provision of mortgage note for attorney's fees by party liable on note.

5. Trover and conversion ⇐ 9(3)

Demand was not necessary as prerequisite to action for conversion of crops, where crops had been either sold or fed to stock before action was brought.

6. Appeal and error ⇐ 761

Supreme Court is not constrained to decide suggestions of error in appellant's brief not noted in questions on first page of brief as required by rules.

In Bank.

Appeal from Superior Court, Mendocino County; W. D. Held, Judge.

Action by J. D. Metzler against the Foster Holding Company, which filed a cross-complaint. From an adverse judgment, the defendant appeals.

Judgment modified and, as modified, affirmed.

Keith C. Eversole, of Ukiah (J. E. Pemberton, of Ukiah, of counsel), for appellant.

Charles Kasch, of Ukiah, for respondent.

THOMPSON, Justice.

The plaintiff obtained a judgment for the sum of $1,701.25 and costs of suit in an action against the defendant Foster Holding Company, a corporation, as damages for the conversion of personal property. The defendant filed a cross-complaint, but

the trial court found that the essential allegations thereof were not true and gave judgment that the cross-complainant take nothing thereon. The defendant appeals.

The following facts explain the nature of the controversy: One Moorhead leased from the Foster Holding Company for two years a dairy ranch in Mendocino county, together with its pure-bred dairy herd and dairy equipment. The herd was to be maintained by breeding at its numerical strength, any excess in such strength to be the property of Moorhead upon the termination of the lease. The lessee was to "leave on the leased premises at the end of said term or sooner termination of this lease as herein provided at least one hundred tons of hay." The venture proved unprofitable, with the result that the lessee became indebted not only to the appellant for unpaid rent, but also to a number of laborers and other creditors, including the plaintiff, the total of these claims being in the sum of $1,550.23. The lessee was finally given notice to quit and surrender the ranch and personal property and equipment thereon to the lessor. He did so on August 31, 1933, and told a representative of appellant that it could have what property he had on the ranch to apply on his indebtedness to it. However, on August 30th, Moorhead executed and delivered a chattel mortgage in favor of respondent, to secure his note for $1,800 and attorneys' fees, in case of collection, but which note was to cover indebtedness to the other creditors mentioned above, the note being in the sum of $1,800 because at the time the parties did not know exactly how much the claims of the creditors would total. A trust agreement was prepared, with a list of the creditors, and the amounts, when ascertained, were set after their names. No claim was asserted for anything in excess of the amount of the indebtedness actually owed. The appellant took possession subsequent to recordation of the chattel mortgage and proceeded to consume the hay, ensilage, corn, and alfalfa, and to sell certain of the stock and hogs belonging to the lessee under the terms of the lease, applying the proceeds thereof to the liquidation of the lessee's rental indebtedness.

The respondent contends that in so doing the appellant was guilty of conversion and responsible in damages to the plaintiff therefor, because of the chattel mortgage he held, which covered "all hay on hand in barns in excess of 100 tons; all growing crops of corn or corn in silos; and alfalfa hay; 2½ silos of barley and ensilage; 7 hogs" and "all of the right, title and interest of the mortgagor in all stock of dairy cows, yearlings, heifers and calves, located upon said premises, which said interest is more particularly described and set forth in that certain lease," etc., the total value of all of which the trial court found to be $3,222.75.

It is appellant's position: (1) That the chattel mortgage was in fact an attempted assignment for the benefit of creditors and, as such, was void and in contravention of sections 3440 and 3459 of the Civil Code; (2) that the chattel mortgage was never delivered; (3) that the description was insufficient; (4) that the chattel mortgage was void because given for an amount in excess of that actually owed; and (5) that the court erred in allowing attorneys' fees.

[1] Considering these contentions in their order, we turn to the question of whether the chattel mortgage is to be considered an assignment for the benefit of creditors and, as such, void as violative of the code sections cited. Section 3432 of the Civil Code provides as follows: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." In form, we must hold that the chattel mortgage complies with the Code section. In substance, we must reach the same conclusion. The court found that the value of the property taken by appellant was $3,222.75, an amount considerably in excess of the indebtedness for which the mortgage was given. It appears, therefore, that Moorhead had a very appreciable interest in the property which he subsequently released to appellant. And, under the test applied in Heath v. Wilson, 139 Cal. 362, 368, 73 P. 182, to wit, the retention of an interest by Moorhead, it must be held that the mortgage was not in fact an assignment for the benefit of creditors.

The second contention is answered by the fact that the trial court, upon specific testimony of delivery, found that delivery was made.

[2] With respect to the argument that the description of the property was insufficient, it must be noted that appellant was as thoroughly informed of the property intended to be covered as any of the parties—it, in fact, knew what property was mortgaged. "It has been held that a description is sufficient if it is such as to en-

able third parties by inquiries to identify the property covered by it." 5 Cal.Jur. p. 54. We have no doubt, especially in view of appellant's position, that the point is unavailing to it.

[3] Nor do we think that the mortgage should be held void because somewhat in excess of the amount of the indebtedness sought to be secured. The testimony discloses that the exact amount was uncertain at the time. It was, however, ascertained and claim made for the proper sum. The court found in this situation that there was no fraud. In one of the cases relied upon by appellant (Wood v. Franks, 67 Cal. 32, 35, 7 P. 50, 52), it is said: "The question whether a mortgage, given for a greater sum than was due, was given in good faith, both for a present indebtedness and to secure future advances, is one of fact for the jury, under proper instructions from the court." And in another (Tully v. Harloe, 35 Cal. 302, 309, 95 Am.Dec. 102), we read: "A mortgage which misrepresents the transaction between the mortgagor and mortgagee, is liable to suspicion, and ought to be critically examined; but if, upon investigation, the real transaction turns out to be fair, and to have been had in good faith, it would be unjust to deprive the person claiming under it of his equitable rights. It is always better, however, for obvious reasons, that the mortgage should be drawn so as to show the true object and purpose of the transaction, for suspicion is engendered by misrepresentation, but disarmed by a statement of the truth." The findings and the evidence support the conclusion that the present mortgage was in good faith.

[4] However, we cannot justify the inclusion in the judgment of attorneys' fees, allowed in the sum of $151.02. The note provided: "In case suit is brought to enforce payment hereof, all parties liable hereunder agree to pay the reasonable attorneys' fees incurred by the holder hereof in that behalf." This action for damages for conversion of the property cannot legitimately be said to be within the provision quoted.

[5] We have discussed all of the questions listed on the first page of appellant's brief except one. It is asserted that a demand was prerequisite to an action for conversion. All of the property was either sold or fed to stock. The sale and use was sufficient evidence of conversion to take this case outside the general rule. Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83.

[6] Other suggestions of error appear in appellant's brief which are not noted in the questions appearing on the first page thereof, as required by the rules of this court. We are, therefore, not constrained to decide the points. We have, however, examined them and find them to be without sufficient merit to warrant a reversal of the judgment.

The judgment is modified by disallowing the sum of $151.02 and reducing the judgment by that amount and, as so reduced, it is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

5 Cal.2d 311

ALLEN et al. v. MEYERS.

Sac. 4913.

Supreme Court of California.

Feb. 7, 1936.

1. Trusts ⇐96

Where wife, while almost unconscious on day before her death, signed deed of her realty to husband, who had promised to convey property to her children by former marriage, constructive trust, enforceable against him, arose in such children's favor.

2. Trusts ⇐348

One paying no consideration for realty, conveyed to her by one who held it as constructive trustee for others, held property impressed with same trust.

3. Trusts ⇐283(2)

Burden was on trustee, acquiring interest in realty held in trust from beneficiaries, or one to whom he conveyed property without consideration, to prove that he acquired interest for sufficient consideration without exerting undue influence over beneficiaries (Civ. Code, § 2235).

4. Trusts ⇐283(1)

Trustee must show utmost good faith in dealing with beneficiaries.

5. Trusts ⇐283(2)

Trust beneficiaries' receipts for money received from constructive trustee of their deceased mother's realty *held* not evidence of waiver or release of their rights in trust property, in absence of evidence that trustee informed them of mother's deposit in bank and nature and value of other property left by her; burden being on trustee to prove that receipts were given for sufficient consideration and not result of his undue influence (Civ.Code, § 2235).

6. New trial ⇐102(3)

Defendant's motion for new trial of action to declare trust in decedent's realty on ground of newly discovered evidence that money decedent left on deposit in bank was in joint account of herself and husband, who conveyed realty to defendant, and became husband's property on wife's death, *held* properly denied for want of diligence, in view of beneficiaries' offer to show by bank records how money came into grantor's possession and defendant's failure to show that such records could not have been examined by her before trial.

7. Appeal and error ⇐173(10)

Defense of laches, not pleaded or raised by defendant at trial, nor relied on in her brief on appeal, cannot be first raised on appeal.

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by E. C. Allen, Zelma M. Lloyd, and another against Olivia J. Meyers. From a judgment for named plaintiffs, defendant appeals.

Affirmed.

W. E. Wright, and Robert W. Tharp, both of Nevada City, for appellant.

Chris. B. Fox, of Oakland, amicus curiæ for Kate Gassaway Meservey.

Vernon Stoll and Lynne Kelly, both of Grass Valley, for respondents.

CURTIS, Justice.

Action brought to declare a trust in certain real property standing in the name of the defendant. Plaintiffs are the children of Mary Gassaway by a marriage prior to her marriage to Joseph H. Gassaway on November 6, 1915. The defendant is a daughter of said Joseph H. Gassaway by a marriage prior to his marriage with Mary Gassaway. At the time of the marriage of Joseph H. Gassaway and Mary Gassaway, the latter was the sole owner of the real property involved herein, and remained such owner until the day before her death, which occurred on November 8, 1919. Her death occurred after and as a result of a protracted and severe illness. On November 6, 1919, her husband said to her that she was going to die and that if she would make a deed of everything to him he would deed it back to her children and thus save cost of probating the estate. The following day and while Mary Gassaway was in an almost unconscious state, she signed a deed to said real property at the request and in favor of her husband, the said Joseph H. Gassaway. She died the next day. There is also evidence in the record that Mary Gassaway had $1,800 in the bank which her husband took possession of after her death. Joseph H. Gassaway continued in the possession of said real property up to the time of his death which occurred on November 23, 1932. A short time before his death he deeded said real property to the defendant who, as stated before, was his daughter by a marriage prior to his marriage to Mary Gassaway. This deed was recorded on June 5, 1933, which was after the death of Joseph H. Gassaway. This action was commenced December

20th of the same year. The evidence also showed that plaintiff T. J. Allen had conveyed to Joseph H. Gassaway during the lifetime of the latter all of the interest of said T. J. Allen in said real property. Upon the conclusion of the trial, the court rendered judgment that defendant Olivia J. Meyers holds title to said real property in trust as to an undivided third thereof for each of the plaintiffs E. C. Allen and Zelma M. Lloyd and that plaintiff T. J. Allen has no interest in said real property. From this judgment the defendant has appealed.

[1, 2] It is first contended that the evidence is insufficient to support the finding of the trial court that there was a trust created. The evidence upon the question as to whether a trust was created is brief and is confined entirely to the testimony of plaintiff Zelma M. Lloyd. It is, however, uncontradicted, and is, in our opinion, sufficient to support the court's finding. She testified that on the day before the deed was executed by her mother to Joseph H. Gassaway, the latter told her mother that she was going to die and "he told her if she would make a deed and deed everything to him he would deed it back to us children to save us the court costs of probating the estate." On the following day and while Mrs. Gassaway was in an almost unconscious state, Gassaway presented a deed to said real property and requested her to sign it, which she did. There is no evidence whatever that Gassaway paid any consideration for said deed. Without indulging in any extended discussion of the law applicable to such a state of facts we deem it sufficient to say that the facts stated bring this case clearly within the rule announced in Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Logan v. Ryan, 68 Cal.App. 448, 229 P. 993; Taylor v. Bunnell, 77 Cal.App. 525, 247 P. 240, which hold that under similar conditions as those existing in the present action a constructive trust arises in favor of the beneficiaries which can be enforced against the grantee. It is conceded that the defendant paid no consideration for the real property conveyed by her father. She therefore would hold the property impressed with the same trust to which it was subject before its conveyance to her.

It is further contended that respondents waived any right that they may have had in said real property by subsequent dealings by them with Joseph H. Gassaway. These subsequent dealings were reflected by two receipts signed by the respondents respectively. One of these receipts, dated June 22, 1921, and signed by respondent Zelma M. Lloyd, acknowledged the receipt by her from Joseph H. Gassaway of the sum of $400 "on account of my share of the real estate of Mary A. Gassaway (my mother) in full." The other receipt dated July 5, 1927, and signed by respondent E. C. Allen, acknowledged the receipt by him from J. H. Gassaway "of the sum of Five Hundred dollars ($500.00) in full of all demands against the estate of Mary A. Gassaway deceased." No probate proceedings were ever had of the estate of Mary A. Gassaway, and the trial court was of the opinion that as the property was conveyed prior to her death, it never became a part of her estate. There was also evidence, as stated above, that Mary A. Gassaway had at the time of her death the sum of $1800 on deposit in a local bank, which sum of money was paid by the bank to Joseph H. Gassaway after the death of his wife.

[3-5] We have already held that Gassaway held said real property as trustee for the benefit of the three children of his deceased wife. Any dealings, therefore, between him and the beneficiaries under said trust regarding the trust property must be viewed and construed in the light of section 2235 of the Civil Code, which reads as follows: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." If, therefore, Gassaway during his lifetime acquired any interest in said real property from the beneficiaries, or either of them, the burden of proof was upon him, and in case of his conveyance of said real property to another without consideration the burden was upon his grantee, to prove that said interest was acquired by him for a sufficient consideration and not under undue influence exerted by him over said beneficiaries. Jacobs v. Ludemann, 137 Cal. 176, 69 P. 965; Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265. Furthermore, in dealing with the beneficiaries the trustee must show the utmost good faith. 26 R.C.L. p. 1375. When, therefore, Gassaway sought to have the children of his deceased wife release

him from their claims to said real property, it was his duty to inform them of the money left by their mother on deposit in said bank, and the nature, character, and value of any other property left by her as well as that deeded to him for their benefit. There is no evidence that any such information was given by Gassaway to either said children during the transaction which resulted in the execution and delivery of the two receipts signed by the respondents respectively. There is then no proof that they were given for a sufficient consideration, or that they were not the result of undue influence, exercised by him over respondents. The burden of furnishing this proof was, as we have seen, upon the appellant, and in the absence of such proof, these receipts standing alone are not evidence that either of the respondents waived or released his or her rights in said trust property.

[6] Appellant also complains of the action of the court in denying her motion for a new trial which was made upon the ground of newly discovered evidence concerning the money left by Mrs. Gassaway on deposit at the time of her death. It is claimed on said motion that the newly discovered evidence would show that this money was left as a joint account in the names of Mr. and Mrs. Gassaway and that on the death of the latter it became the property of Gassaway. Whatever bearing this evidence might have upon the final determination of the case, it is quite evident that no showing of diligence was made by appellant to have the evidence produced at the trial of the action. Some discussion arose during the trial regarding the nature of this deposit, and the respondents offered to show by the records how this $1,800 came into the possession of Gassaway. This offer, while no objection thereto was made by the appellant, was never acted upon by the court. Had appellant been desirous of having the records of the bank in evidence at the trial, she could have acquiesced in respondents' offer, and the court would no doubt have given the privilege to either party to produce them. No showing was made that the bank records were not open to the inspection of appellant, or that they were not easily accessible and could not have been examined by appellant prior to the trial. The court denied the motion for a new trial on the ground that "no showing whatever is here made upon the matter of diligence." The motion, in our opinion, was properly denied.

[7] An amicus curiæ brief has been filed by one of the daughters of Joseph H. Gassaway other than the appellant. In addition to the questions discussed by the appellant, the brief of amicus curiæ raised the question of laches on the part of respondents in the institution of this action. It is true that the action was not instituted until after the death of Joseph H. Gassaway. But the deed from him to the appellant was not filed for record until after the death of appellant. The defense of laches was not pleaded nor was it raised by appellant at the trial, nor is it relied upon in her brief filed on this appeal. The defense of laches may not be raised for the first time on appeal. 10 Cal.Jur. 556. It is true that if the action had been commenced during the lifetime of Joseph H. Gassaway he might have given a satisfactory explanation of his transactions with respondents. There is no evidence in the record aside from the presumptions mentioned above that in these transactions he violated any obligation imposed upon him as trustee under the deed to him from his wife. There was no evidence whatever as to just what did take place during these transactions, and, as we have heretofore shown, the burden of showing that these transactions were supported by a sufficient consideration and were not the result of undue influence rested with the appellant. In the absence of any such evidence, the presumptions created by section 2235 of the Civil Code must prevail.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

5 Cal.2d 288

PENN MUT. LIFE INS. CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

S. F. 15369.

Supreme Court of California.

Feb. 3, 1936.

Rehearing Denied March 2, 1936.

1. Corporations ⇐542(3)

Corporation may not be used by its officers or stockholders as means of diverting its profits to payment of premiums on insurance policies to enrichment of beneficiaries to detriment of its creditors.

2. Insurance ⇐585(6)

Where trust agreement regarding proceeds of policies on lives of officers of corporation could have been revoked without corporation's consent and existence of corporation at death of beneficiaries was condition precedent to corporation's enjoyment of any part of proceeds of policies, corporation was entitled to equitable lien on proceeds as security for repayment of premiums paid by corporation.

3. Subrogation ⇐2

Where corporation declined to assert its right to repayment, out of proceeds of policies on officer's life, of premiums paid by corporation, creditors of corporation had right to subrogate themselves in its stead.

4. Estoppel ⇐63

Where parties place themselves in dual positions, they cannot be permitted to choose course most favorable to themselves and which would prejudice rights of third parties if by pursuing another course a more equitable solution of problem would be attained.

5. Interpleader ⇐29

Evidence *held* to sustain trial court's refusal to find that premiums paid by corporation, on policy covering officer's life and as to which premiums corporation allegedly had equitable lien on proceeds of policy as security for repayment, were on account of wages due officer.

6. Equity ⇐389

That fraud or contra bonos mores are not pleaded does not deny court right of scrutinizing bona fides of transaction in effort to arrive at fair and equitable conclusion.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Bill of interpleader by the Penn Mutual Life Insurance Company against the Bank of America National Trust & Savings Association, a corporation, and others. From the judgment, the named defendant appeals.

Affirmed.

Keyes & Erskine, Thornton & Watt, Livingston & Livingston, and Rolla B. Watt, all of San Francisco, for appellant.

Milton Newmark and Ernest J. Torregano, both of San Francisco, and Carleton L. Rand, of Oakland, and Leon W. Scales, of Honolulu, Hawaii, for respondent trustee in bankruptcy of Mullin-Acton Co.

R. O. Purvis, Varnum Paul, John A. Sullivan, and John J. Taheny, all of San Francisco, for respondent Associated Indemnity Corporation.

David Freidenrich, of San Francisco, for plaintiff Penn Mut. Life Ins. Co.

SEAWELL, Justice.

This appeal is from judgments aggregating the sum of $7,261.31, with interest and court costs, rendered in favor of the trustee in bankruptcy of Mullin-Acton Company, a corporation, and Associated Indemnity Corporation, and against a portion of the proceeds of three life insurance policies issued upon the life of Spencer J. Johnson, Jr., held as a trust fund by appellant bank for certain purposes which will hereafter appear. Said judgment of $7,261.31 represents premiums paid by Mullin-Johnson Company on said policies of insurance issued on the life of Johnson. Said trustee in bankruptcy and Associated Indemnity Corporation, as judgment creditors of Mullin-Johnson Company, claim that said payments were made without consideration and said funds should be applied to payment of Mullin-Johnson Company's indebtedness. An attorney's fee in the sum of $750 was awarded to the attorney of appellant bank, trustee, payable out of said trust fund.

The Bank of America National Trust & Savings Association, by merger proceedings, became the successor in interest to the Humboldt Bank in the trust agreement, and is prosecuting this appeal. It is taken as a matter of fact that Mullin-Acton Company and the Mullin-Johnson Company are in reality one and the same entity by succession and that Spencer J.

Johnson, Jr., and George H. Mullin owned all of the stock of both corporations in equal shares, as well as all of the stock of Frank Howard Allen & Co., which was the original corporation. All three corporations appear to have been incorporated for the same purpose, and the names are used interchangeably by court and counsel, notwithstanding they bear separate names and did on certain occasions transact business in their respective names.

The action has to do directly with the right of creditors to apply the premiums paid by the Mullin-Johnson Company on three certain insurance policies of the face value of $10,000 each, issued by the Penn Mutual Life Insurance Company, a corporation, on the life of Spencer J. Johnson, Jr., by the terms of which the Humboldt Bank of San Francisco was named as beneficiary. Spencer J. Johnson, the insured, died February 14, 1932. Before any of said policies were paid, the Penn Mutual Life Insurance Company admitted its liability on said policies of insurance, and, being moved to action by the fact that writs of attachment and garnishments had been served upon it by various claimants of the insurance proceeds, paid into the registry of the court the sum of $27,190.40; said sum being the balance due after deducting from the cash surrender value of said policies the sum of $4,140 borrowed by said Johnson on said policies, and filed a complaint in interpleader. With the consent of all parties to the proceeding, said insurance company was thereupon dismissed from, and relieved of, all liability or responsibility respecting the disposition of the proceeds of said policies.

In order to throw as much light upon the unusual and anomalous transactions of Mr. Johnson and Mr. Mullin, the principal actors in the matter, as the record affords, it is necessary to turn back to the beginning of their first business association as insurance brokers, conducted in the original corporate name of Frank Howard Allen & Co. According to the pleadings —very little oral testimony was taken at the trial—the name was subsequently changed to Mullin-Acton Company and again changed to Mullin-Johnson Company. No reason is given for the organization of the several corporations, nor does it appear whether or not the existing corporation was dissolved upon the organization of the one which next followed it, or that any one has since become dissolved. It is the position of appellant that the companies are the same entities. Johnson and Mullin at all times owned in equal shares all of the stock of the several entities, except one or two qualifying shares. Nothing is told concerning the date of organization of any one of said corporations or the period of its existence.

On October 18, 1933, judgment was entered against the Mullin-Johnson Company and in favor of Associated Indemnity Corporation, one of the interpleading defendants herein, in the sum of $1,622.21. On February 14, 1933, interpleader Raymond A. Burr, as trustee in bankruptcy of Mullin-Acton Company, a corporation, obtained a judgment in the sum of $31,757.01 against the Mullin-Johnson Company. This company filed an answer herein in which it identified itself as the "Mullin-Johnson Company, also known as the Mullin-Acton Company, Brokerage Department, a corporation." Its answer raises no substantial issue. The identity and separate legal obligations of the two corporations are left in an exceedingly vague state, but the inference is strong that both were insolvent. One was admittedly adjudged a bankrupt some time before 1933.

It appears that Messrs. Johnson and Mullin were associated in the life insurance brokerage business some time prior to the execution of the trust indenture herein, and, when operating under the name of Frank Howard Allen & Co., each had procured three life insurance policies on his own life in the sum of $10,000 each, proceeds payable to their respective estates. How long the above policies had existed before the present plan was organized is not shown. However, on June 10, 1924, Mr. Johnson, Mr. Mullin, Humboldt Bank, and Frank Howard Allen & Co. entered into an agreement, which they call a trust indenture, wherein it was recited that the lives of Johnson and Mullin, respectively, were insured in the Penn Mutual Life Insurance Company in the sum of $30,000 on three separate insurance policies payable, respectively, to the estates of the insured, and that it was the intention of said Johnson and Mullin to change the beneficiaries from their respective estates to the Humboldt Bank, and thereby appoint said bank trustee of the proceeds of said policies. Said Johnson and Mullin did thereupon assign said policies to the bank for the uses and purposes in said trust set forth, and agreed that said policies should be so changed as to make the bank the beneficiary with

such reference to the trust as the insurance company should require. Said Frank Howard Allen & Co. was to pay the premiums on all policies. In the event of the death of said Johnson, the bank was to collect the insurance due on the policy of the deceased insured and to loan or invest the same in such manner as it may see fit, with full power to hold, manage, control, and dispose of every part of the trust estate. The trust agreement contains the usual provisions for the payment of taxes, assessments, compensation of the trustee, and other omitted formal matters which have no material bearing on the question as to whether the creditors of the corporation which paid the premiums are entitled to recover the same from the fund which was created by the proceeds of said policies, in the circumstances of the case presented.

It is by said agreement provided that the money collected upon the life policies of said Johnson and Mullin shall be kept in two separate funds named, respectively, the Johnson fund and the Mullin fund. Johnson and Mullin were married men, and the first consideration of each, as testified to by Mullin, was the protection of their respective wives. The fund provisions being identical in all respects, except as to the names of their respective wives and their nominees or heirs, it will be necessary only to consider the Johnson fund. It is provided by paragraph X of said indenture that the net annual income from the proceeds of said policies shall be paid to Mildred P. Johnson, wife of Spencer J. Johnson, Jr., monthly. In addition to said monthly income, the trustee may pay her so much of the principal as it may see fit, provided it shall not pay her in the aggregate more than $15,000. Upon the death of Mildred P. Johnson $15,000 in cash or securities of that value —to be taken from the principal of the Johnson fund less the amount of principal paid to the said Mildred P. Johnson during her lifetime—shall be paid to such person or persons as Mildred P. Johnson shall have designated by her written designation filed with the bank during her lifetime and not revoked by written revocation, and, if at the time of her death there be no unrevoked designation on file with the bank, then to such person or persons as the said Mildred P. Johnson shall have appointed by her last will and testament, and, if there be no such designation or appointment, then to the heirs at law of the said Mildred P. Johnson, "and the balance of the principal of the Johnson Fund, not exceeding in value $15,000, shall be paid, transferred and delivered to said company [Frank Howard Allen & Company] but if at the time of the death of the said Mildred P. Johnson, the said company shall not be in existence as a corporation authorized to do business under the laws of the State of California, then the balance of the principal of the said Johnson Fund that would have been paid, transferred and delivered to the said company if it had been in existence as a corporation authorized to do business under the laws of the State of California, shall be paid, transferred and delivered to such person or persons as the said Mildred P. Johnson shall have designated by her written designation filed with the bank during her lifetime and not revoked * * * and if at the time of her death there be no such unrevoked designation on file with the bank, then to such person or persons as the said Mildred P. Johnson shall have appointed by her last will and testament, and if there be no such designation or appointment, then to the heirs at law of the said Mildred P. Johnson; and if such balance exceeds $15,000 the excess over $15,000 shall be paid to the persons designated or appointed by the said Mildred P. Johnson as above stated, or to her heirs at law."

Paragraph XI provides that, if the said George H. Mullin should die within three months after the date of the death of the said Spencer J. Johnson, Jr., then the portion of the said Johnson fund which would have been payable to the said Frank Howard Allen & Co. on the death of the said Mildred P. Johnson shall be paid to the said Mildred P. Johnson five years after the death of the said George H. Mullin, if she is living, but, if she shall have died within the said period of five years, then the portion of the said Johnson fund that would have gone to her if she had lived for five years after the death of Mullin shall be paid and delivered in the same manner as it would have been paid if George H. Mullin had lived three months after the death of said Johnson.

"XII. It is mutually agreed that this trust agreement may be revoked or modified at any time by a written notice of revocation or modification signed by the said Spencer J. Johnson, Jr., and the said George H. Mullin. It is further agreed that after the death of either one of them,

it may likewise be revoked or modified by the survivor of them with the written consent of the widow of the one who has died; and if both Spencer J. Johnson, Jr., and George H. Mullin are dead it may be revoked or modified by the written consent of their two widows (or the survivor of them) and the consent of the bank. All such notices of revocation or modification shall be filed with the bank. No modification of the trust shall be valid unless such modification shall be assented to by the bank."

"XIV. All beneficiaries under this trust are hereby forbidden to sell, pledge, assign or otherwise dispose of their right, title, or interest in any part of the principal or interest of the trust property, and no assignment or order by any beneficiary by way of anticipation of any part of the income of the trust herein created shall be valid; but the income shall be paid by the trustee directly to the beneficiary or deposited to the beneficiary's account in some bank designated by such beneficiary without regard to any assignment or order; nor can the principal or the income of the said trust be attached or garnished while in the hands of the trustee."

The foregoing extracts sufficiently describe the trust instrument under which the proceeds, if collected, were to be held, managed and disposed of. It was executed by Mullin, as president of Frank Howard Allen & Co., and by Johnson, Mullin and the Humboldt Bank and approved by Mildred P. Johnson, wife of Spencer J. Johnson, Jr., and by Lorraine Sands Mullin, wife of George H. Mullin.

On November 16, 1926, by an agreement entered into between Spencer J. Johnson, Jr., and George H. Mullin as trustors and the Humboldt Bank as trustee, and the Mullin-Acton Company, Brokerage Department, the original trust instrument was modified to conform to a certain agreement entered into by George H. Mullin and his wife, Lorraine Sands Mullin, whereby it was agreed between them to make the trust agreement dated June 10, 1924, irrevocable in so far as the benefits therefrom might flow to said wife for a period of ten years, provided she should live that long, commencing March 1, 1926, and ending February 29, 1936. Said modification has to do with the power of revocation or modification of the trust as it affected Mullin and wife, and it has no particular relevancy to the main question at issue.

The three policies from which the trust fund is derived are similar in tenor and effect and purport to make the Humboldt Bank the beneficiary, and provide that the right to change the beneficiary is not reserved by the insured, as provided in section 4 thereof. They bear numbers, dates of issuance, and written annotations as follows:

No. 1202657 is dated June 29, 1926. It was issued in place of one which bears the same number and which policy was dated April 21, 1926, and thereafter canceled. The policy as issued is to have the same privileges as if issued March 24, 1924.

No. 1315624 was issued April 19, 1928, in place of policy No. 1221330, which policy was in force more than a year.

No. 1107551 was issued July 12, 1926, instead of one bearing the same number and dated March 24, 1924, which policy was canceled, and the policy issued July 12, 1926, is to have the same privileges as if dated March 24, 1924.

The numbers of said original three policies existing at the time the trust agreement was made, to wit, June 10, 1924, were 1107551, 1107554, and 1107555. The proceeds were payable to the estate of Johnson. In order to make the bank the beneficiary under said policies, instead of his estate, the insured and all parties to the trust agreement assigned said policies to the bank for the uses set forth in said trust agreement, and agreed that the policies be so changed as to make the bank the beneficiary. Original policies 1107554 and 1107555 were delivered to the Humboldt Bank, and were by it surrendered to Johnson and were no longer subject to the trust agreement. One of said policies so substituted for the surrendered policies is policy No. 1315624; the other is 1202657, and the original policy No. 1107551, constitutes the genesis of the policies involved in this proceeding.

On May 6, 1931, the Bank of America National Trust & Savings Association, successor of the Humboldt Bank—the consent of all parties to the said agreement having been obtained—assigned all of the aforesaid policies of insurance to the insured, Johnson, so that he might borrow thereon. On May 11, 1931, he borrowed from the plaintiff insurer the sum of $4,140, no part of which was repaid. On

June 1, 1931, said insured reassigned said policies to the bank and caused it to be designated the beneficiary, making each of said policies payable to the bank as trustee in accordance with the provisions of said trust instrument as modified.

Both of the defendants, Associated Indemnity Corporation and the trustee in bankruptcy of Mullin-Acton Company, obtained money judgments in 1932 against Mullin-Johnson Company in the respective sums of $1,622.21 and $31,757.01. The total amount paid to the plaintiff insurer on account of premiums on the Johnson policies was $8,317.55. At the time Johnson borrowed said $4,140 from the insurance company he paid on account of premiums then due $1,056.24. This amount, deducted from the full amount of premiums, to wit, $8,317.55, leaves $7,261.31, the amount paid by Mullin-Johnson Company as premiums. The court in its judgment limited the amount recoverable by said creditors to the amount of the premiums paid by Mullin-Johnson Company. Of that sum the Associated Indemnity Corporation, being a prior attaching creditor, was awarded the full amount of its judgment obtained in said action against Mullin-Johnson Company, $1,622.21, and the trustee in bankruptcy of Mullin-Acton Company was awarded the remainder of said fund, $5,639.10. The trustee in bankruptcy prayed for the full amount of its judgment of $31,757.01 as against said insurance fund, but the court by its judgment specially limited the sum to be paid to said trustee in bankruptcy to the remainder, to wit, $5,639.10, premium accumulations, and decreed that the balance of the fund so deposited in the registry be delivered to the Bank of America National Trust & Savings Association, as trustee, and that said bank pay a fee to Attorney Morse Erskine in the sum of $750. No appeal was taken by the trustee in bankruptcy from this judgment or any part thereof.

As to whether the judgment in this case would render the trust fund immune from attack on any or all possible grounds is not a matter properly before us for decision. The bank as trustee is appealing from that portion of the judgment which decreed that the portion of the fund derived only from premiums paid by Mullin-Johnson Company is subject to execution on the creditors' claim. The balance of said fund, consisting of $19,929.19, is to be held intact by the bank as trustee under the agreement of June 10, 1924.

Appellant claims that Mullin-Johnson Company, corporation, having agreed to pay the premiums on the life of Johnson, an officer of said corporation, brings the case within the rule announced in Murray, Executrix, v. G. F. Higgins Co., 300 Pa. 341, 150 A. 629, 75 A.L.R. 1360, and the annotations which follow. The cases therein relied on hold that it is the general rule that a corporation has an insurable interest in the life of an officer on whose services the corporation depends for its prosperity and whose death will be the cause of a substantial loss. In all of the cases reviewed therein it appears that the insured president or head executive officer was a person who possessed special technical knowledge or exceptional ability, energy, and initiative, and, in order to make secure its financial position, the company had an insurable interest in the life of its president. In those cases the proceeds of the policies went to the immediate use of the company which paid the premiums, and the possession of said proceeds was not dependent upon remote possibilities or subject to be entirely defeated by the acts or will of parties who would profit by such defeasance. Neither was Mr. Johnson, who was secretary of one of the corporations and vice president of another, shown to have possessed unusual ability, energy, or initiative. In the instant case the trust agreement could have been revoked by the joint consent of Mullin and Johnson or with the consent of the survivor of either and the wife of the deceased member of the corporation. As a condition precedent to the enjoyment of any part of the fund which the Mullin-Johnson Company had created said corporation was required to continue to exist as a corporation authorized to do business under the laws of the state to the close of the life of Mildred P. Johnson. The many contingencies which were likely to arise to defeat even the remote chance of the corporation ever enjoying any part of the proceeds of said policies, as appear in the body of the trust agreement, render the likelihood that the corporation which paid the premiums will ever benefit thereby in any substantial manner so small as to justify the conclusion that a bona fide consideration did not exist for the payment of the premiums. Confusion exists as to the purpose, objects, and aims of the several entities. We find the trustee in bankruptcy of the Mullin-Acton Company obtaining a judgment

against the Mullin-Johnson Company, and yet it is claimed that they constitute but one corporation, of which Johnson and Mullin own all of the stock. The original policies, under the regime of Frank Howard Allen & Co., made the estates of Johnson and Mullin their beneficiaries. These policies, by assignments and by the process of interchange, were converted so as to finally make the Humboldt Bank the beneficiary. The unusual trust agreement was thereupon executed. That the change was made to protect the wives and families of Johnson and Mullin is made clear by the positive testimony of Mullin. It is further confirmed by the nature of the instrument itself. It contains provisions forbidding assignments by any of the beneficiaries of any interest therein created, and attempts to make both the principal and income of the trust corpus immune from attachment or garnishment while it remains in the hands of the trustee. The record discloses nothing from which it may be implied that any of said corporations were ever prosperous. In fact, it appears that for some years back they were in a weakened financial condition. In 1931 Johnson borrowed on his policy the sum of $4,140 and paid on account of premiums then due and which were the obligation of Mullin-Johnson Company the sum of $1,056.24. In 1932 Mullin-Acton Company was a bankrupt. In the same year Mullin-Johnson Company had a judgment docketed against it by the creditors of Mullin-Acton Company in the sum of $31,757.01. The premiums which were paid on account of the Johnson policies aggregated approximately $1,500 per annum, and presumably those paid on account of Mullin's policies, the same amount, totaling $3,000 per year. An indebtedness of more than $33,000 existed against Mullin-Johnson Company approximately one year after Johnson had paid out of the moneys he had borrowed from the insurance company the premiums that Mullin-Johnson Company had failed to pay.

[1] It is true that it is the policy of the law to protect, where equitable to do so, the widow and dependents of the insured. It is also true that a corporation may not be used by its officers or stockholders as a means of diverting its profits or proceeds to the payment of premiums on insurance policies to the enrichment of its beneficiaries at the expense of, or to the detriment of, its creditors. This is a question to be determined upon the facts of each case presented.

[2, 3] Mullin-Johnson Company was not bound to pay the premiums, for the reason that it was not the owner of the policy and there was no sufficient consideration, as we view the trust agreement and the evidence, warranting it in making such payments, but, if it paid voluntarily, having some claim or color of interest in the policy, it thereby acquired an equitable lien on the proceeds of the policy as security for the repayment of its advances. 3 Pomeroy, Equity Jurisprudence, § 1243. The most that can be said is that said corporation had but a color of interest in the proceeds of said policies. This being so, it was entitled to repayment of its advances. The corporation declined to assert its claim, inasmuch as Johnson and Mullin owned all the stock. Neither they nor their beneficiaries would proceed against the trust fund created for the uses set forth in the trust agreement. This being so, the creditors of said corporation had a right to subrogate themselves in its stead.

[4] The various corporations were admittedly "two man" corporations, and each one was the alter ego of the owners of said corporations. The rule is that, where parties place themselves in dual positions, they will not be heard to complain if they are not permitted to choose a course most favorable to themselves and which would prejudice the rights of third parties if by pursuing another course a more equitable solution of the problem would be attained.

[5] Appellant strenuously contends that the premiums paid by the corporation were on account of wages or salaries due and allowed Johnson and Mullin by the corporation and thus furnish a consideration for the payment of said premiums; that, as directors of the corporation, Mullin-Johnson Company, they allowed themselves wages or salary equalling the accrued premiums. This contention has support only in the testimony of Mullin. His testimony on this issue is not convincing, and the trial court evidently did not credit it. That it was entirely within the power of the trial court to weigh the evidence and judge of the credibility of the witness is not questioned. It is claimed, however, that the court arbitrarily rejected this testimony. We have examined and considered the testimony with respect to

the rules of probability, interest of the witness, its reasonableness in the circumstances of the case, and find no reason for holding that the trial court committed error in refusing to accept the statement of the witness as to payment of salary to Johnson and Mullin by the corporation. The claim is out of harmony with the plan or scheme of the organization, and has no support in any other part of the record.

[6] No question of fraudulent intent on the part of Mullin and Johnson in formulating the trust plan or in procuring said insurance policies is raised by the pleadings. Whether fraud or contra bonos mores are pleaded or not does not deny the court the right of scrutinizing the bona fides of the transaction in an effort to arrive at a fair and equitable conclusion. Upon a full examination of the case we are satisfied that the trial court arrived at such a conclusion.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.

10 Cal.App.2d 734

HARRIS v. HARRIS.

Civ. No. 10109 (2—1).

Supreme Court of California.

Feb. 17, 1936.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

On petition for hearing.

Hearing denied.

Prior opinion, 52 P.(2d) 985.

Goodspeed, Pendell & McGuire and G. Roy Pendell, all of Los Angeles, for appellant.

Frank S. Hutton, of Los Angeles, for respondent.

PER CURIAM.

The petition for hearing after decision by District Court of Appeal, Second District, Division 1, is denied.

Petitioner contends that the last sentence of the opinion is ambiguous. We do not so construe it. Reading this sentence in connection with the remaining portions of the opinion, we think the intent of the writer of the opinion was to hold that plaintiff is not entitled to any further payments of alimony maturing after October 18, 1930, but without prejudice to her rights to proceed in the divorce action to recover any unpaid installments of alimony accruing prior to that date.

MURPHY v. MURPHY et ux.*

Sac. 4953.

Supreme Court of California.

Feb. 13, 1936.

Rehearing Granted March 12, 1936.

Constitutional law ⇐191

Amendment to statute, changing requirement that action be brought to trial within five years after filing of answer, to requirement that action be brought to trial within five years after filing of action, *held* not, as applied to action commenced before amendment was passed, violative of plaintiff's rights, where plaintiff had over 15 months from date of amendment to bring action to trial (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lulu Mignon Murphy against S. S. Murphy and wife. From an order dismissing the action, plaintiff appeals.

Affirmed.

Lulu Mignon Murphy, in pro. per.

John R. Cronin, of Stockton, for respondents.

PER CURIAM.

This is an appeal by plaintiff from an order of the superior court dismissing an action under section 583 of the Code of Civil Procedure because not brought to trial within five years after filing thereof. The action was filed October 29, 1929 The notice of motion to dismiss was given

December 27, 1934, and the order of dismissal entered January 3, 1935. Plaintiff contends that the amendment of August, 1933 (St.1933, p. 853), to section 583, making the five-year period run from the filing of the action instead of from the filing of the answer, is invalid where retroactively applied to her action. This matter has been fully considered by this court in other decisions, and in view of the fact that plaintiff had a period of over fifteen months from the date of the amendment to bring the action to trial, there was no violation of her rights in applying the amended statute to her suit. See Rosefield Packing Co. v. Superior Court (Cal.Sup.) 47 P.(2d) 716.

The order is affirmed.

5 Cal.2d 329

STITT v. STITT.

L. A. 15376.

Supreme Court of California.

Feb. 13, 1936.

Appeal and error ⇐659(2)

Motion for diminution of record to bring before Supreme Court trial court's order, made after filing of transcript, correcting typographical errors in findings as originally signed would be granted, where correction was properly made by trial court, and complete understanding of record required that corrections be brought up and made part of record.

In Bank.

Appeal from Supreme Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by Julia Louise Stitt against Corwin J. Stitt. From the judgment, the defendant appealed, and plaintiff moved for a diminution of the record.

Motion for diminution granted.

W. C. Dalzell, of Los Angeles, for appellant.

Paul J. Otto and Paul E. Iverson, both of Los Angeles, for respondent.

PER CURIAM.

Respondent has moved for a diminution of the record in order to bring before this court an order, made by the trial court subsequent to the filing of the transcript here, correcting certain typographical errors which occurred in the findings as originally signed.

It sufficiently appears that the correction was properly made by the lower court, and that it is necessary to a complete understanding of the record that the order making the corrections be now brought up and made a part of the record on appeal.

The motion for diminution is therefore granted.

5 Cal.2d 320

HILL v. FRICKE et al.

Sac. 4900.

Supreme Court of California.

Feb. 10, 1936.

1. Liens ⇐3

Lien and agreement declaring existence thereof on ranch, for maintenance of which son made advances both before and after ranch owner's death, with understanding on part of sons' brother and stepmother that all advances should constitute lien, *held* supported by consideration, justifying foreclosure.

2. Liens ⇐22

Agreement declaring lien on ranch for advances by son both before and after owner's death *held* to have effect of mortgage without right to deficiency judgment, and involved "lien" within statute defining lien as charge on property securing performance of act (Civ.Code, § 2872).

3. Liens ⇐22

Agreement declaring lien on ranch for advances to be repaid in event of any sale or other disposition of ranch *held* not limited to voluntary as distinguished from involuntary sale, and hence foreclosure action was not premature.

4. Appeal and error ⇐110

Order denying new trial is nonappealable.

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Gene Hill against Edwin H. Fricke, Arthur R. Fricke, and another. From a judgment for plaintiff and an order denying a new trial, the last-named defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

E. L. Webber and Mervin C. Lernhart, both of Napa, and A. Q. Lomba, of Oakland, for appellant.

Fred A. Watkins, of Long Beach, for respondent.

WASTE, Chief Justice.

This is an appeal from a decree foreclosing a lien on real property.

The evidence discloses that during his lifetime Doctor Richard Fricke owned a ranch in Napa county, where he lived in retirement with his second wife, the defendant Pearl Huyck Fricke. Financial reverses, coupled with the fact that the ranch was not self-supporting, caused Doctor Fricke, over a period of time, to borrow various sums of money from his son, Edwin H. Fricke, one of the defendants herein. These sums were applied to the operation and maintenance of the ranch. At no time did the defendant and appellant, Arthur R. Fricke, also a son, advance any money to his father or contribute to the maintenance of the ranch. The relation of trust and confidence that existed between father and son caused Edwin to refuse his father's offer to transfer the property to him or to execute a mortgage thereon in his favor to secure him for the advances and loans so made. Subsequently, and after informing his wife and son Arthur of the advances made by Edwin, and of his desire and intention to impress a charge or lien on the ranch to secure same, Doctor Fricke executed a gift deed to the ranch, naming his wife and two sons as grantees. This deed was delivered to Edwin with the understanding that the other two grantees named therein should recognize the indebtedness of the grantor as a charge upon the property.

Upon the death of his father approximately three years thereafter, Edwin paid all bills incidental to the last illness and burial and continued to make advances for the maintenance and operation of the ranch. The appellant Arthur continued to contribute nothing. In view of developments, Edwin sought an agreement with his brother and stepmother, cograntees with him in the deed from his father, fixing the amount of the advances he had made, before and after the father's death, and declaring the total to be a lien against the real property. Accordingly, an itemized statement of moneys advanced by Edwin was prepared, totaling $11,938.-74, and brought to an attorney's office by Gene Hill, plaintiff and respondent herein, who is the business associate of Edwin, who is blind. The appellant Arthur, who was informed that he was free to bring his attorney with him, and the defendant Pearl Fricke met with Hill at the attorney's office and there executed a written agreement fixing the amount of Edwin's advances, in the amount above specified, and declaring the same to be a lien upon the ranch property, in accordance with the deceased grantor's desire, and specifically exempting Arthur and Pearl from personal liability. In other words, the land alone was made subject to the payment of the obligation. In its preliminary paragraphs, the written agreement recites that Edwin had made advances to his father for the maintenance and preservation of the ranch; that the father had intended and agreed that the advances should be a lien against the property; that the father subsequently transferred the property to his wife and two sons with the understanding that Edwin was to have a lien thereon for all advances, which were to be repaid "in the event of any sale or other disposition of the real property"; and that after the father's death Edwin continued to make advances for the maintenance of the property "with the understanding and agreement of the co-owners, namely, Pearl Huyck Fricke and Arthur R. Fricke [appellant] that any and all of said advances should constitute a lien against said real property." The agreement then goes on to declare that in consideration of the matters so recited, the co-owners do acknowledge and agree that Edwin has paid out to and for their use and benefit in and for the maintenance, operation, and preservation of the property the sum of $11,938.-74, which amount, without interest, "is and shall be and remain a lien against said real property until said amount is fully paid and discharged." The agreement further provides that Edwin shall "look to said real property for the satisfaction and discharge of said indebtedness." In the event of "any sale or any disposition of said real property" which does not realize a sufficient amount to pay said lien, it is provided the co-owners are not to be held

for any deficiency, but in the event an excess remains it is to be divided equally among the parties.

Subsequently, Edwin assigned his interest in the agreement to the plaintiff and respondent Hill, a close friend and business associate who has undertaken to care for Edwin for the remainder of his life. Hill thereupon commenced this action for the foreclosure of the lien and sale of the property. The defendant Arthur alone defended the suit, the others permitting their defaults to be entered. Judgment went for the plaintiff, and the property was sold by a duly appointed court commissioner at public auction. The plaintiff bid in the property for the amount of the judgment, subject to a prior encumbrance in favor of the Federal Land Bank of Berkeley. This appeal followed.

[1] There is no merit in the contention that the lien and the written agreement declaring the same are unsupported by a consideration. A mere recitation of the facts constitutes sufficient answer to the point. Moreover, the agreement expressly states that many of the advances for the maintenance of the property were made after the father's death "with the understanding and agreement of the co-owners," included among whom was appellant, "that any and all of said advances should constitute a lien against said real property."

[2] Appellant urges that the written agreement should "not be interpreted to be a mortgage" because at the time of its execution he was opposed to the giving of a mortgage. Respondent has never requested that it be construed as a mortgage. He refers to it as a lien, and prays that it be enforced as such. Obviously, its effect is that of a mortgage without any right to a deficiency judgment. The sole purpose of the agreement was to charge the property in writing with the repayment of the sums advanced by Edwin. Section 2872 of the Civil Code defines a lien as "a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." A lien here existed within the statutory definition.

[3] Urging that the maturity of the debt was contingent upon the happening of a future event, viz., a voluntary sale of the property, the appellant contends that this action to foreclose was prematurely instituted. The contention is based on the words "in the event of any sale or other disposition of the real property," appearing in the agreement. These words cannot properly be construed as words of limitation. They do not refer exclusively to a voluntary sale. In fact, to so interpret them would do violence to the phrase "or other disposition" of the property. The advances had been made and were immediately due and were payable upon a "sale or other disposition" of the property, whether voluntary or involuntary.

Other contentions, wanting in merit, do not require specific treatment. We have examined the entire record and find nothing that would warrant a reversal of the judgment. The equities are against the appellant.

[4] The judgment is affirmed. The order denying a new trial being nonappealable, the purported appeal therefrom is dismissed.

We concur: THOMPSON, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



5 Cal.2d 243

CITY AND COUNTY OF SAN FRANCISCO v. ALAMEDA COUNTY.

S. F. 15039.

Supreme Court of California.

Jan. 28, 1936.

1. Taxation ⇐195

Purpose of constitutional amendment excepting property, located outside municipalities and subject to taxation when acquired, from exemption from taxation was to safeguard tax revenues of smaller communities (Const. art. 13, § 1, as amended in 1914).

2. Waters and water courses ⇐154(1)

Rights to waters of stream are inseparably annexed to soil and pass with grant of land.

3. Taxation ⇐195

Water rights acquired by city and county outside municipality, from water company which had acquired rights from riparian

owners, *held* "land" within constitutional provision regarding exceptions to exemption from taxation (Const. art. 13, § 1, as amended in 1914).

[Ed. Note.—For other definitions of "Land," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the City and County of San Francisco against the County of Alameda. From a judgment for defendant, plaintiff appeals.

Affirmed.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Robert H. McCreary, R. Robert Hunter, and James H. Oakley, Deputy Dist. Attys., all of Oakland, for respondent.

PER CURIAM.

This is an appeal from a judgment in favor of the defendant in an action to recover taxes paid under protest.

Prior to the first Monday in March, 1930, the Spring Valley Water Company owned approximately 37,500 acres of land in Alameda county with improvements thereon, which land and improvements were held by the company as properties useful in supplying water to the inhabitants of San Francisco and contiguous territory. At the same time the company was the owner of rights to take and divert water from Alameda creek and its tributary branches in Washington and Pleasanton townships in Alameda county. These rights the company had acquired by purchase or condemnation from owners of land riparian to Alameda creek for business, commercial, and nonriparian purposes.

Before noon on the first Monday in March, 1930, the city and county of San Francisco acquired the above-described lands, improvements, and water rights by purchase from the Spring Valley Water Company. While the ownership thereof was in the company, the assessor of Alameda county regularly assessed to the company those lands, improvements, and water rights, and pursuant to said assessments taxes were paid by the company to that county. For the fiscal year 1930–1931, said property was assessed and taxes thereon were collected from the plaintiff city and county the same as theretofore from the plaintiff's predecessor in interest.

No question was raised by the plaintiff as to the propriety of the taxation of the 37,500 acres of land and improvements thereon in Alameda county, but it took the position that the water rights which had been acquired from riparian owners on Alameda creek were neither "lands" nor "improvements thereon" as contemplated by the amendment of section 1 of article 13 of the Constitution in 1914, and accordingly paid the tax on said water rights under protest and now seeks to recover the same, contending that said water rights are exempt from taxation.

Prior to 1914, subdivision 1 of article 13 of the State Constitution provided that all property in this state with certain exceptions not here pertinent, should be taxed in proportion to its value to be ascertained as provided by law; that the word "property" should include "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership"; but provided that certain other designated property "and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within the state shall be exempt from taxation." In 1914 the section was amended by adding immediately after the last-quoted words the following: "Except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever construtced by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county, or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county, or municipal corporation in which said

lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the state board of equalization."

[1] The undoubted purpose of the amendment was primarily to safeguard the tax revenues of smaller counties wherein large municipal corporations had purchased, or would acquire, extensive holdings and which would, except for the amendment, be exempt from local taxation. With the exemption in force, the serious financial embarrassment of the counties in which the holdings were situated was a reality. The argument sent to the electors of the state when the amendment was proposed also discloses that, unless the amendment be adopted, impending disaster would result to smaller counties by the removal from the local tax rolls of lands and water rights acquired and to be utilized in connection with the acquisition or extension of municipal water supplies such as were then in progress by the city and county of San Francisco and the city of Los Angeles. The adoption of the amendment was evidence that the acquisition of such lands and water rights should be without prejudice to the outlying counties whose existence from an economic and governmental standpoint depended upon the tax revenues derived therefrom. It was therefore provided that such lands and improvements thereon as were taxable at the time of the acquisition of the same by municipalities should continue to be taxable and should not be exempt from local taxation. The fact that the continuing right of taxation should in some instances inure to the benefit of counties not so sorely pressed by reason of the prior exemption, is but an incident and cannot disturb the manifest and general operation of the amendment. The question is whether the water rights acquired by the plaintiff by purchase from the Spring Valley Water Company were included within the term "land" as used in the constitutional amendment, and, as such, therefore separately assessable in Alameda county.

[2, 3] The case was tried on a stipulation of facts from which it appears that the rights acquired by the Spring Valley Water Company were rights to divert the water of Alameda creek as against lands riparian to the creek. While the right to the waters of the stream is a usufructuary right inuring to the benefit of riparian lands, such rights are inseparably annexed to the soil and pass with a grant of the land, not necessarily as an easement or appurtenance but as parcel of the land itself. Miller & Lux v. James Co., 179 Cal. 689, 178 P. 716. When the owner has divested himself of a right such as here assessed to the plaintiff, he has parted with an interest in the land as contemplated by the constitutional amendment. It must be assumed that by the grant he has stripped the land of much of its value. In some cases the value of the land severed from the water right might well be negligible for taxing purposes. In such event the county wherein it is situated would be deprived of tax revenues from it the same as if the owner had conveyed to the municipality the title to the land. Such a result would subvert the purposes of the constitutional amendment and render the same ineffectual for the purposes intended.

The conclusion seems irresistible that when the water rights were owned by the riparians, they were a part of the land itself and formed an important element in the valuation of the land for taxing purposes; that when those rights were severed from the land the valuation of the land for purposes of taxation was or might be materially reduced, and when so severed they should not lose the characteristics which had theretofore attached to them, taking into consideration the objects and purposes of the constitutional amendment. When acquired by the plaintiff they should therefore be deemed to retain those characteristics the same as when owned by the plaintiff's predecessor in interest.

The judgment is affirmed.

SCARLETT v. ATCHISON, T. & S. F. RY.*

S. F. 15448.

Supreme Court of California.

Jan. 31, 1936.

Rehearing Denied Feb. 27, 1936.

1. Master and servant ⇐111(1)

Where injury is proximately caused by condition existing in violation of federal safety appliance acts, carrier is absolutely liable therefor, although it is ignorant of defect and has used ordinary care to maintain its equipment in required condition (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

2. Master and servant ⇐111(1)

Word "secure," within Federal Safety Appliance Act providing that all cars requiring secure ladder and secure running board shall be equipped with such ladders and running boards, means more than firmly fastened, but means safe for use in purpose for which it is intended (Federal Safety Appliance Act of 1910, § 2, 45 U.S.C.A. § 11).

[Ed. Note.—For other definitions of "Secure," see Words & Phrases.]

3. Master and servant ⇐111(1)

Where carrier has complied exactly with rule of Interstate Commerce Commission, carrier's equipment cannot be held insecure so as to impose absolute liability for injuries sustained by employees (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

4. Master and servant ⇐111(1), 286(13)

Where Interstate Commerce Commission has not made a rule in regard to particular matter, test as to carrier's liability is whether appliance is safe or secure within meaning of Safety Appliance Act, and such question is for jury (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

5. Master and servant ⇐111(1)

Safety Appliance Act must be liberally construed for purpose of relieving trainmen of danger, and similar construction should be given rules of Interstate Commerce Commission formulated under authority of act (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

6. Master and servant ⇐111(1)

Interstate Commerce Commission rule requiring clearance of 2 and preferably 2½ inches as minimum clearance of treads for ladders on cars *held* not to legalize round rod type of brace in space between car side and ladder which created greater hazard than some types of bracing generally in use when rule was adopted (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

7. Master and servant ⇐286(13)

In action by brakeman who fell while descending ladder of freight car allegedly because of obstruction consisting of round brace rod running diagonally across side of car, whether ladder was secure *held* for jury (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

8. Appeal and error ⇐1046(5)

In action by brakeman who fell while descending ladder of freight car allegedly because of obstruction consisting of brace rod running diagonally across side of car, judge's alleged remarks that although Interstate Commerce Commission had made rule, jury should determine whether appliance was secure, *held* not prejudicial where judge also stated, if railroad complied with rule of commission, question of negligence could not be raised (Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11–16).

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by William W. Scarlett against the Atchison, Topeka & Santa Fé Railway for personal injuries based on the Federal Safety Appliance Act. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 43 P.(2d) 608.

Robert Brennan, Leo E. Sievert and H. K. Lockwood, all of Los Angeles, for appellant.

James F. Hoey, of Martinez, Clifton Hildebrand, of San Francisco, Warren Cunningham, of Martinez, and Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for respondent.

F. Britton McConnell and Joseph A. Spray, both of San Francisco, amici curiæ for respondents.

SEAWELL, Justice.

Plaintiff recovered judgment against defendant Atchison, Topeka & Santa Fé Railway, a corporation, for $18,000 damages for personal injuries received by him in the course of his employment by said defendant as a brakeman. Defendant appeals from the judgment.

The accident took place on August 27, 1931, at Mormon, Cal. Plaintiff had been upon the top of the rear car of a cut of freight cars in the course of his employment, and was descending the ladder on the

side of the car when his foot slipped and he fell to the ground. He received serious injuries, including the fracture of bones of his left wrist. It became necessary to remove certain of the bones of the wrist, with the result that plaintiff has suffered a permanent disability to his left hand, wrist, and arm, which prevents his continuance in employment as a railroad brakeman.

[1] The ladder from which plaintiff fell is located on the side of the car, within a few inches from the end of the car. Back of the ladder, in a diagonal position, is a round metal rod, which serves to brace the end and side of the car. Plaintiff attributed his fall to the presence of this diagonal brace rod. He testified that as he descended the ladder his foot came in contact with the diagonally placed round brace rod, instead of the horizontal ladder rung, causing him to lose his footing and fall to the ground. At the time plaintiff fell, the train was moving at a speed of about two miles an hour. It is his contention that the presence of this round bar rendered the ladder insecure, in violation of provisions of the Federal Safety Appliance Act of 1910 (36 U.S.Stat. 298, U.S.C.A., title 45, §§ 11–16). Where an injury is proximately caused by a condition existing in violation of any of the several safety appliance acts of Congress, including the Boiler Inspection Act, 36 U.S.Stat. 913, as amended (U.S.C.A., title 45, §§ 22–34), the carrier is absolutely liable therefor, although it is ignorant of the defect and has used ordinary care to maintain its equipment in the required condition. St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 294, 28 S.Ct. 616, 52 L.Ed. 1061; Baltimore & Ohio R. R. Co. v. Groeger, 266 U.S. 521, 527, 45 S.Ct. 169, 69 L.Ed. 419; Illinois Central R. R. Co. v. Williams, 242 U. S. 462, 466, 37 S.Ct. 128, 61 L.Ed. 437; Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 43, 36 S.Ct. 482, 60 L.Ed. 874; U. S. v. Chicago, St. P., M. & O. Ry. (C.C.A.) 43 F.(2d) 300, 302, 71 A.L.R. 507. The effect of said acts is to substitute an absolute liability for the common-law liability based on negligence. Not only is the liability absolute, but by express statutory provision the defenses of assumption of risk and contributory negligence are eliminated. 27 U.S.Stat. 532, U. S.C.A., title 45, § 7; 35 U.S.Stat. 66, U.S.C. A., title 45, §§ 53 and 54; Great Northern Ry. Co. v. Donaldson, 246 U.S. 121, 38 S.Ct. 230, 62 L.Ed. 616, Ann.Cas.1918C, 581; Texas & Pac. Ry. v. Rigsby, supra; Ballard v. Sacramento N. Ry., 126 Cal.App. 486, 490, 14 P.(2d) 1045, 15 P.(2d) 793. Where the action is not predicated upon a violation of safety appliance acts, but on common-law negligence not constituting a violation of said acts, the defense of assumption of risk is permitted, and as to contributory negligence the statute provides that damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. U.S.C.A., title 45, § 53; Erie R. Co. v. Lindquist (C.C.A.) 27 F.(2d) 98.

In the instant case the plaintiff bases his claim to recover on a violation of the provisions of the Safety Appliance Act of 1910 (section 2) to the effect that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards." 36 U.S.Stat. 298, U. S.C.A., title 45, § 11. He relies solely on the presence of the round diagonally placed bar behind the ladder, which, he contends, rendered it insecure in violation of the act. On the trial he expressly waived any rights of recovery he might have based on common-law negligence independently of the above-quoted provision of the Safety Appliance Act. Accordingly the trial court sustained plaintiff's objection to evidence by which defendant sought to show assumption of risk.

By virtue of section 3 of the Safety Appliance Act of 1910, supra (45 U.S.C.A. § 12), the Interstate Commerce Commission has authority to designate "the number, dimensions, location, and manner of application of the appliances" provided for by the act. The carrier is subject to a penalty of $100 for permitting any car to be hauled on its line not equipped as provided in the act. Section 4 of the act (45 U.S.C.A. § 13). By virtue of the authority vested in it by Congress, the commission has specified certain requirements for ladders, including a specification for clearance as follows: "Minimum clearance of treads, two (2), preferably two and one-half (2½) inches." It is admitted herein that there is a space of 2¾ inches between the outside of the round diagonal bar and the inside of the ladder rung.

Defendant contends that in view of this 2¾ inches clearance it must be held as a matter of law that the ladder was "secure"; that the Interstate Commerce Commission is intrusted by Congress with authority to determine the requirements for safety appliances, and an appliance cannot be held insecure or unsafe in a respect in which it fully complies with the commission's rules.

[2] Respondent contends that the rules of the commission merely establish minimum requirements; if an appliance fails to comply with a rule of the commission, it must as a matter of law be held insecure or unsafe, but it does not follow that because it conforms to the rule that it is safe or secure; the statute requires a secure ladder, meaning a safe ladder, and it is for the jury to determine whether a ladder conforming to rules of the commission is secure. Respondent further contends that if compliance with a rule as to a particular matter renders the appliance "secure" as a matter of law in that regard, nevertheless where the insecurity lies in a detail as to which the commission has no rule, it is for the jury to say whether the appliance is secure. Applying this argument to the instant case, respondent contends that the rule of the commission providing for a clearance of 2 to 2½ inches for ladders contemplates clearance between the flat side of the car and the ladder, and does not authorize the introduction into the clearance space between car side and ladder (even though it is greater than 2½ inches) of a round bar standing out from the side of the car and diagonally placed behind the ladder in such manner as to create a hazard to employees in using it. It has been held that "secure" means more than firmly fastened; it means safe for use in the purpose for which it is intended. Davis v. Reynolds (C.C.A.) 280 F. 366.

[3] We are of the view that respondent can succeed herein only if the rule as to clearance was not intended to cover the situation shown by the facts herein. If the rule applies, it must be held that the ladder is "secure." Respondent's contention that the rules of the commission prescribe mere minimums, although it finds support in Western & A. R. R. v. Meister, 37 Ga.App. 570, 140 S.E. 905, is contrary to the weight of authority and to better reasoning. The commission has facilities to conduct expert investigation and inquiry as to safety appliances which a jury deciding a single case lacks. Under the act of 1910 (section 3 [45 U.S.C.A. § 12]), the specifications of the commission "shall remain as the *standards* of equipment to be used on all cars subject to the provisions of this Act [chapter]." In view of the fact that violation of the statutory duty to provide safe and secure equipment and appliances is attended with absolute liability, and not dependent on failure to exercise due care to provide safe equipment, as was the common-law liability, it is of importance to the carrier to know in an exact manner what it can do to discharge this duty. The rules of the commission prescribe the "standards" of equipment, and where the carrier has complied exactly with a rule of the commission, its equipment cannot be held insecure in that regard.

In the standardization itself there is an element of safety. In Illinois Central R. Co. v. Williams, 242 U.S. 462, 466, 37 S.Ct. 128, 61 L.Ed. 437, the Supreme Court stated that it was the purpose of the safety appliance acts to make the appliances ultimately conform to a standard to be prescribed by the commission, in order that uniform appliances should be found in the same place by employees who work always in haste, and often in darkness and storm.

In Lancaster & Wight v. Allen, 110 Tex. 213, 217 S.W. 1032, it was contended that the flange of a locomotive wheel had become worn to such an extent that the locomotive was "not in proper condition and safe to operate" under the Boiler Inspection Act. 36 U.S.Stat. 913, 38 U.S.Stat. 1192, see U.S.C.A., title 45, § 23 et seq. It was held that if the flanges had not become worn to the extent prescribed with particularity by a rule of the commission in defining defective flanges, the railroad could not be held guilty of negligence in that regard. To the same effect are: Lehigh & N. E. R. Co. v. Smale (C.C.A.) 19 F.(2d) 67; Mahutga v. Minneapolis, St. P., S. S. M. Ry. Co., 182 Minn. 362, 234 N.W. 474; Auschwitz v. Wabash Ry. Co., 346 Ill. 190, 178 N.E. 403. It might be that if the commission made a rule which so palpably tended to endanger the safety of employees that reasonable minds could not differ as to its effect, it would not be binding. The authority vested in the commission is to make regulations which will promote safety. But it is not to be contemplated that the commission will abuse its authority.

[4] This brings us to respondent's second contention, that the commission's rule as to 2 to 2½ inches clearance for ladders was not intended to govern the situation where the clearance space between car side and ladder, although greater than 2½ inches, contains a hazardous diagonally placed round brace rod. Where the commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held

that because the commission has failed to regulate a particular matter, that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail. By sections 3 and 4 of the act of 1910, 36 U.S.Stat. 298 (45 U.S.C.A. §§ 12, 13), a penalty is provided for failure to comply with the act, and not only for violations of rules promulgated by the commission. This conclusion is fortified by decisions interpreting another provision of the act. Section 3 provided that the commission should make rules within six months, but that it might extend the period within which any carrier should comply with respect to equipment in service when the act was passed. It was held that although the commission might extend the time for compliance with its rules, there was a duty to supply "secure" appliances from the effective date of the act, and the commission could not extend the time for compliance with this mandate. Illinois Central R. Co. v. Williams, 242 U.S. 462, 37 S.Ct. 128, 61 L.Ed. 437; Tyon v. Wabash Ry. Co., 207 Mo.App. 322, 232 S.W. 786. As to injuries occurring before the rules became effective, the question was whether the appliance was "secure." The same question is now presented when there is a claim of insecurity as to a matter not regulated by rule of the commission. The act of 1910 became effective July 1, 1911. The commission extended the date for compliance with its rules to a date more than five years later.

In Baltimore & O. R. Co. v. Groeger (C. C.A.) 288 F. 321, 324, the court said: "While the Interstate Commerce Commission is authorized to make rules and orders in furtherance of the enforcement of this law [the Boiler Inspection Act], nevertheless its failure to make a rule or an order covering every defective condition or construction within the meaning of section 2 of the Boiler Inspection Act by no means relieves the carrier from complying with the provisions of that section." This language is equally applicable to the Safety Appliance Act of 1910. The Boiler Inspection Act, § 2, 36 U.S.Stat. 913, as amended (45 U.S.C.A. § 23) requires the appliances subject thereto to be "in proper condition and safe to operate in the service to which the same are put." The Safety Appliance Act of 1910 requires ladders to be "secure," which has been interpreted to mean safe for the use to which they are to be put. Davis v. Reynolds, supra. The Supreme Court reversed the Groeger Case for certain error in instructions (266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419), but it expressly recognized that as the commission had not regulated completely the matter as to which it was claimed the equipment was defective, there was a question for the jury as to whether the boiler was in proper and safe condition. See, also, Gerow v. Seaboard Air Line Ry., 189 N.C. 813, 128 S.E. 345; Davis v. Reynolds, supra; Pennell v. Philadelphia & Reading Ry., 231 U.S. 675, 34 S.Ct. 220, 58 L.Ed. 430.

The jury viewed a freight car with a ladder of the construction shown in the instant case. Photographs of ladders of this type, and of other ladders, appear in the record. We are of the view that the jury was justified in its decision that this bar constituted a hazard which rendered the ladder insecure, unless it must be held that the clearance rule of the commission legalizes the position of the bar.

The distance from the side of the box car to the inside of the diagonal brace rod is ⅞ of an inch; the diameter of the rod is 1⅛ inches; the distance from the outside of the diagonal brace rod to the inside of the rungs of the ladder is 2¾ inches. The rule of the commission is simply: "Minimum clearance of treads, two (2), preferably two and one-half (2½) inches." The rule of the commission contains no reference to bracing, which in some type is generally found on the side of freight cars at the end in a position behind the side ladder. On wooden cars a brace of some type is needed to protect the car because the greatest strain and stress is at the ends of the car. Diagonal braces consisting of flat pieces of metal, several inches in width and bolted to the side of the car, and diagonally placed U-shaped metal braces, the bottom of the U being bolted to the side of the car, are used by other railroads and were used by defendant until it adopted the round rod type of brace in 1929. The defendant is the only railroad using a brace of this precise type, and it has a large number of cars so braced in use. According to witnesses for defendant, braces of the flat or U type may buckle in use, which renders them useless as a brace and reduces the clearance between car side and ladder, with the result that the car must be sent to the shop.

The rules of the commission pertaining to ladders were adopted in 1911, including the clearance provision. The type of construction with the round rod brace bar was not used until 1929. It seems readily apparent

from the photographs and testimony that the round brace rod constitutes a far greater hazard to safety than does the flat metal brace bolted to the car side. As to the relative safety of the U type of brace, as compared with the round rod type used by defendant, the distinction as to safety is not so clear. The extent to which the U type is in use does not appear. It should also be pointed out that the other types of diagonal braces, except one, as shown by photographs, also differed from the round rod type in that they ran from a point on the bottom line of the car side or car end diagonally to the top corner, whereas the round rod runs from a point on the bottom line of the side of the car to a point on the side line of the car side approximately midway between the top and bottom, and a second brace, of the flat type, then runs from the midway point diagonally to a point on the top line of the car side. This causes the round rod to pass under the ladder rung at a different angle, and different position in relation to the ladder rungs than the single brace bar, which may render the round rod a greater hazard than the other types of bracing.

[5-7] The Safety Appliance Acts are to be liberally construed for the purpose of relieving trainmen of danger. U. S. v. Chicago, St. P., M. & O. Ry. Co. (C.C.A.) 43 F. (2d) 300, 71 A.L.R. 507; Frye v. Chicago, R. I. & P. Ry. Co., 157 Minn. 52, 195 N. W. 629. A similar construction should be given to rules of the commission formulated under authority of these acts. In the light of this principle, we conclude that the clearance rule of the commission should not be construed as a legalization of the round rod type of brace in the space between car side and ladder, which creates a greater hazard than some, if not all, of the types of bracing generally in use when the commission's rule was adopted; that in such cases, even though there is a space of slightly more than 2½ inches between the outside of the round bar and the inside of the ladder rungs, it is for the jury to say whether the ladder is secure within the meaning of the Safety Appliance Act of 1910.

What we have here said is not to be understood as an approval or requirement of any particular type of construction. It is for the railroads and the Interstate Commerce Commission to solve engineering problems. But where the commission has not made a rule as to a particular matter, it is for the jury to decide whether the appliance is "secure." Evidence of the use of diagonal bracing, although of a different type, by other roads, and testimony of certain of defendant's witnesses that they knew of no other accident attributed to the round rod, were before the jury for consideration. The fact that other roads had accepted defendant's cars of this type for movement over their lines, and the further fact that the commission had made no specific regulation as to these bars, although they had been in use since 1929, were circumstances to be weighed by the jury. A carrier is authorized to refuse any car of another line if it does not comply with the Safety Appliance Acts, and if it accepts a car which violates those acts, it is absolutely liable for injury due to such violation. 27 U.S.Stats. at L. p. 531, U.S.C.A., Title 45, § 3; Tyon v. Wabash Ry. Co., 207 Mo. App. 322, 232 S.W. 786, 790. But we are of the view that these several facts, although pertinent for the consideration of the jury, do not compel the conclusion that as a matter of law the ladder was "secure" within the meaning of the statute. Great Northern Ry. v. Donaldson, 246 U.S. 121, 128, 38 S.Ct. 230, 62 L.Ed. 616, Ann.Cas. 1918C, 581; U. S. v. Chicago, St. P., M. & O. Ry. (C.C.A.) 43 F.(2d) 300, 315, 71 A. L.R. 507.

[8] For the most part defendant's assignments of error in the giving or refusing of instructions are disposed of by what we have said above. After the court had instructed the jury, it returned to ask certain questions of the judge. It appears that the jury wished to know whether in view of the clearance rule quoted above, it was authorized to find for plaintiff notwithstanding there was a space of more than 2½ inches between the diagonal bar and the ladder rung. The question was not very clearly put, and the judge's answer, as well as certain remarks made by him during the course of the trial and in the instructions already given, contains statements which might indicate a misconception of the law to the effect that although the commission had made a rule in regard to a particular detail of construction, nevertheless it was for the jury to say whether an appliance which conformed to the rule was "secure" in that regard. But the judge also said: "Now any provision or any condition imposed by the Interstate Commerce Commission, a compliance with that you could not—if that was complied with, that couldn't raise the question of negligence because they have to

follow that particular rule." We are of the view that the remarks of the judge which may seem to be in conflict with the quoted statement do not constitute reversible error.

If this were a case where a rule of the commission regulated the matter under consideration, and liability depended on whether the facts showed compliance with said rule, it might well be held that the judge's statements constituted reversible error. But we have held that this is a case where the commission has not made a rule governing a condition shown to exist, and hence the question was, as stated repeatedly by the trial judge, whether by reason of this condition the ladder was insecure or unsafe within the meaning of the statute. The judge correctly instructed the jury that the only ground on which it could find the ladder insecure was the presence of the round brace bar.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; CONREY, J.; LANGDON, J.



5 Cal.2d 306

DRY CLEANERS & DYERS INSTITUTE OF SAN FRANCISCO & BAY COUNTIES, Incorporated, v. REISS et al.

S. F. 15496.

Supreme Court of California.

Feb. 7, 1936.

Rehearing Denied March 5, 1936.

1. Appeal and error ⇐460(2)

Temporary injunction against furnishing of dry cleaning service at less than specified price *held* not mandatory injunction from which appeal would automatically stay execution, defendants being free to remain idle.

2. Appeal and error ⇐478

On petition for writ of supersedeas staying temporary injunction, Supreme Court cannot determine validity of injunction.

3. Appeal and error ⇐478

On appeal from order granting temporary injunction against furnishing of dry cleaning service at less than specified price, trial court's finding that defendants signed price fixing agreement could not be inquired into by Supreme Court on petition for writ of supersedeas.

4. Appeal and error ⇐484

Purpose of writ of supersedeas is to maintain subject of action in statu quo until final determination of appeal.

5. Appeal and error ⇐479(1)

On appeal from order granting temporary injunction against furnishing of dry cleaning service at less than specified price, defendants *held* not entitled to supersedeas, in absence of showing of any injury from obeying injunction.

In Bank.

Action by the Dry Cleaners & Dyers Institute of San Francisco & Bay Counties, Inc., against Phil Reiss and others. From an order granting a temporary injunction, defendants appealed, and petitioned the Supreme Court for a writ of supersedeas.

Petition for supersedeas denied, and temporary order staying operation of temporary injunction dissolved.

Herbert Choynski, of San Francisco, for appellants.

Jerome Politzer and Walter H. Duane, both of San Francisco, for respondent.

CURTIS, Justice.

In this action the court, upon the filing of the complaint herein, issued its order directed to the defendants to appear in said court and show cause why an injunction should not be issued restraining them "from doing, advertising to do, and from offering to do or from selling any dry cleaning service at retail less than the" minimum price set out in a schedule of prices set forth in said complaint. In response to said order said defendants appeared, and a hearing was had upon the application of plaintiff for a temporary injunction directed to defendants restraining them during the pendency of this action from doing any of the acts enumerated in said order to show cause mentioned above, and at the conclusion of said hearing, and as a result thereof, the court directed that a temporary injunction issue as prayed for in its said complaint. From this order the defendants have appealed. The trial court threatens to enforce said injunction by contempt proceedings against the defendants, and as a result of said threatened proceedings the defendants are now before this court ask-

ing for a writ of supersedeas staying the enforcement of said temporary injunction.

[1] The first ground upon which the defendants base their right to said writ is that the injunction issued by the court is a mandatory injunction and therefore an appeal therefrom automatically stays its execution. As we have seen, the injunction restrains the defendants from charging for any dry cleaning service performed by them less than the minimum price fixed by said schedule. Defendants construe this mandate of the court as requiring them to carry on their business as dry cleaners and charge for the service rendered by them the minimum price fixed as aforesaid, and therefore that such a mandate is a mandatory injunction requiring them to do an affirmative act. We cannot agree with defendants in the interpretation of the language of said order of injunction. By its terms the defendants are not required to perform any act whatever. They may sit by and do nothing and permit their plant to remain idle. The only requirement that the injunction lays upon them is that if they do engage in business as dry cleaners they shall not charge for their work a price less than the schedule of prices fixed in said schedule.

The same question practically was before the court in the case of Ohaver v. Fenech, 206 Cal. 118, 273 P. 555, where the defendant was enjoined from feeding his hogs the garbage from the city of Sacramento. He appealed from the injunction and contended that the injunction was a mandatory injunction in that its effect was to compel him to remove his hogs to some other locality and that a compliance would require affirmative action on his part. He, therefore, contended that his appeal stayed the injunction. The court, however, held that under the injunction he was only required to refrain from feeding his hogs the objectionable material, that the hogs might be kept where they were and given other food, and that the injunction could not be distorted into an order requiring the removal of the hogs. So in the case before us, the defendants may carry on their business as before, and the only act they are restrained from performing is that of charging less than the specified rates for their services. The requirement compelling them to charge these minimum rates if they carry on their business does not purport to direct them to carry on their business or perform any other affirmative act. They may continue to do business as before and charge the fixed rates, or even rates higher than those fixed by the written agreement, or they may cease business temporarily pending the appeal from the order of injunction.

"An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden act. An injunction that restrains the continuance of an act or series of acts may be just as much of a preventive or prohibitory injunction as one that restrains the commission of an act. State v. Superior Court, 39 Wash. 115, 80 P. 1108, 1 L.R.A.(N.S.) 554, 109 Am.St.Rep. [862] 867, 4 Ann.Cas. 229; United Railroads v. Superior Court, 172 Cal. 80, 85–87, 155 P. 463, and cases there cited." Jaynes v. Weickman, 51 Cal.App. 696, 699, 197 P. 672, 673.

[2, 3] In this proceeding we are not called upon, nor is it within our province, to determine the validity of the order of injunction. That question must be left for determination by the court at the hearing of the appeal from said order. The question therefore which the defendants have raised in their petition as to whether or not the defendants signed said written agreement fixing the schedule of prices is not pertinent to any issue now before us. The trial court evidently found that this agreement was signed by the defendants and this finding cannot be inquired into in a petition for a writ of supersedeas. The case of Endicott v. Harry Rosenthal, 216 Cal. 721, 16 P.(2d) 673, cited by defendants, construed a contract having possibly some of the features contained in the written agreement involved herein. That case may be of assistance to the court when it comes to the consideration of the appeal from the order of injunction, but it serves no such purpose at the present.

[4, 5] The purpose of the writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal. Conceding that this court has the power to issue such a writ suspending the execution of a prohibitory injunction, no sufficient showing has been made in this proceeding which would justify the court in issuing the writ. The defendants are permitted to continue in business and to carry it on as before with the single exception that they must conform to the injunctive order of the court as to prices.

No showing is made whatever that they, or either of them, will suffer irreparable injury, or any injury, whatever by meeting the conditions of the injunction. They, therefore, have not presented to this court a state of facts sufficient to justify it in exercising its power in their behalf. Hulbert v. California Portland Cement Co., 161 Cal. 239, 246, 118 P. 928, 38 L.R.A. (N.S.) 436; Ohaver v. Fenech, 206 Cal. 118, 124, 273 P. 555.

Petition for supersedeas denied and the temporary order staying the operation of said temporary injunction is hereby dissolved.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

VAN TIGER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 10773.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1936.

Hearing Granted by Supreme Court March 31, 1936.

1. Courts ⇐112

Rough minutes of court, wherein petition for distribution of estate was approved and notation was made that final account was settled and distribution ordered, were not official records of court.

2. Executors and administrators ⇐315(1)

Court's decree of final distribution of estate in volume of "Orders and Decrees of the Superior Court, Probate Department," entered by decree clerk, was the minute book of the court and constituted rendition of court's judgment (Probate Code, § 1221).

3. Executors and administrators ⇐315(3)

Decree of superior court properly distributing property of an estate per stirpes instead of per capita could not be amended to distribute property per capita as intended by superior court as shown by rough minutes of court, since to authorize correction for clerical error there must be an actual mistake (Probate Code, §§ 225, 250).

4. Judgment ⇐304

Where judgment accords with findings, any omission, if error, is judicial rather than clerical, and, while it might have been corrected by changing findings before entry of judgment, it cannot be remedied by an amendment made after judgment is entered, even though findings and judgment as made and entered do not accord with court's previous intentions.

5. Prohibition ⇐30

In proceeding for prohibition to prevent modification of final decree of distribution of an estate, where record presented sufficient case for consideration by Court of Appeal as one arising on writ of review, even if petitioner was not strictly entitled to writ of prohibition, court could give such relief as record presented warranted.

McCOMB, Justice pro tem., dissenting.

Proceeding for writ of prohibition by Ruth Van Tiger against the Superior Court of the State of California in and for the County of Los Angeles.

Writ of prohibition granted.

Marcus L. Roberts, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Frank G. Finlayson and George S. Dennison, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The petitioner, Ruth Van Tiger, is petitioning the court for a writ of prohibition against the respondent to prevent it from modifying a final decree of distribution entered in the estate of Nathan Brickman, deceased. The respondent is represented in court by the attorneys for Ruth Johnston who was the administratrix of said estate as well as one of the heirs. She is the real party in interest and for convenience will be called the respondent. The nominal respondent hereinafter will be called the trial court. By the terms of the will of decedent his estate was left to his lawful heirs. The testator left neither issue, nor spouse, nor parents, nor brothers, nor sisters. The lawful heirs were his nieces and nephews and they succeeded to the property "by right of representation" (Probate Code, § 225), i. e., the sons and daughters of a deceased brother or sister of testator were entitled to the same share or right in the estate that the brother or sister would have taken as an heir if living. Probate Code, § 250.

The petitioner herein, Ruth Van Tiger, was the sole and only child of a deceased

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 851.

brother and was entitled to one-third of the estate. The respondent, Ruth Johnston, was one of five children of testator's deceased sister. She and her brothers and sisters were each entitled to a one-fifth of one third, or a one-fifteenth, interest in the estate. There were three children of another deceased brother, each of whom was entitled to a one-ninth interest in the estate.

[1, 2] When the estate was ready for distribution the respondent, as administratrix, filed her final account and petition for distribution setting forth the relationship of the heirs as above set forth, praying that the estate be distributed to said nine heirs "share and share alike." Her petition for distribution was uncontested. The petition was examined in the first instance by Commissioner J. W. Mullin, Jr., who placed the following notation on his rough minutes: "Rec. O. K. C. T. D. extra fees," which when interpreted meant, "Recommended, O. K., Court to determine extra fees." When the petition came on for hearing on January 10, 1935, the following entry was made in the court's rough minutes: "Final account settled and distribution ordered," signed by J. W. Mullin, Jr., and with the notation, "It is so ordered," signed "Walton J. Wood, Judge." These rough minutes were not official records of the court. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91. Thereafter and on January 14, 1935, the decree clerk of the court entered the court's decree of final distribution in a volume of "Orders and Decrees of the Superior Court, Probate Department." Only this record was the minute book of the court within the meaning of section 1221 of the Probate Code. This entry constituted the rendition by the court of its judgment. Brownell v. Superior Court, supra. The decree as entered distributed the estate one-third to the petitioner herein, one-ninth each to the three children of a deceased brother of the testator, and one-fifteenth each to the five children of the other brother, including the respondent. The respondent did not pay over the money, however, as directed in the court's decree. The petitioner herein lived in Iowa, and the respondent first sent to her the sum of $1,665.83, and thereafter sent her an additional sum of $1,205.63, which sums were $5,742.92 less than petitioner was entitled to, and received from the petitioner herein, a signed receipt which read: "Being balance *in full* of my distributive share under decree of distribution in the above entitled estate."

When the petitioner learned the facts, she commenced proceedings in the trial court to compel the respondent to deliver to her one-third of the estate in accordance with the decree. To this motion the respondent filed an answer setting forth substantially the facts as above narrated, and in addition an allegation that the court announced at the hearing and intended that its decree would be to distribute the property to the nine heirs "share and share alike"; and at the same time and upon the same facts respondent served a notice of motion "to correct the decree as entered so as to make it conform to the decree as ordered by the court." The motion was made in court on November 20, 1935, ten months after the decree was entered. These two matters came on for hearing at the same time and were submitted on the same evidence. Thereafter the trial court announced that it would modify the original decree so as to distribute the property share and share alike unless restrained by the prohibition of this court. It is to arrest the making of such order that the petitioner herein now petitions the court for a writ of prohibition.

[3] It will be observed that respondent does not claim that the facts of the case are otherwise than as set out in the decree nor that the decree does not distribute the estate exactly as the law directs. The decree speaks the truth as to the facts in the case. The decree correctly found the facts with regard to the relationship of the parties to be as above set forth and no other distribution would have been proper under the facts of the case and the law applicable thereto. The rights of the respondent were not impaired by the decree as entered. Indeed it is nowhere claimed in the answer of respondent that her rights were impaired by the decree. Thus the only alleged mistake (socalled) is merely that the clerk correctly entered the decree in compliance with the law and the admitted facts. There was no mistake.

The respondent cites to this court numerous authorities to the effect that the court may upon motion of the injured party, or on its own motion, correct clerical mistakes (Code Civ.Proc. § 473, last paragraph, as amended by St. 1933, p. 1851), and that every court has power to amend and

control its process and orders so as to make them conform to law and justice (Code Civ.Proc. § 128, subd. 8), and that "all courts of records have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case." Crim v. Kessing, 89 Cal. 478, at page 486, 26 P. 1074, 1076, 23 Am.St.Rep. 491. But these legal precepts are predicated upon the necessary prerequisite that there is an injured party; that there has been a mistake; that the judgment as entered does not conform to law and justice; that the judgment as entered does not conform to the actual facts and speak the truth of the case. Profound erudition sometimes gets its eyes so closely riveted upon one small portion of a legal precept that it cannot view the whole thereof and see, when read as a whole, its persuasive beauties of common sense. Respondent does not cite us to any authority, and we know of none, that says a court has jurisdiction to amend a judgment or decree when once properly made where there is no mistake, where there is no injured party, where the decree as originally entered confroms to law and justice and where it conforms to the actual facts and speaks the truth of the case.

The rule that a court may amend its orders so as to correct a mistake has no application to a case containing no element of mistake. 14 Cal.Jur. 992, and cases cited. While a mistake of a clerk in the entry of judgment may and should be corrected by the trial court on motion, this gives the court no jurisdiction to amend an order which contains no mistake, and a valid judgment will not be set aside unless it is made to appear that a different result might have been reached. 14 Cal.Jur. 1052, and cases cited. It has been said that nunc pro tunc orders are made to preserve substantial rights, "though always * * * to preserve and never to impair the rights of litigants." Osmont v. All Persons, etc., 165 Cal. 587, at page 591, 133 P. 480, 482. "The power to make such a direction is, however, to be exercised *only for the purpose of doing justice.*" De Leonis v. Walsh, 140 Cal. 175, at page 178, 73 P. 813, 814.

[4] It seems to be the respondent's contention that if she could get the judgment "corrected" so as to distribute the estate per capita instead of per stirpes, then the judgment would contain a *judicial* error and could not now be corrected. She says: "If, in its order of January 10, 1935 [the date of the hearing], the Court did err in ordering a per capita instead of a per stirpes, distribution, that error, if error there was, was a judicial error, and not a mere mistake of the clerk. Such error, therefore, if error there was, could not be corrected after the clerk had entered the decree of distribution." Surely the courts are not such weak crutches upon which justice must limp. In this case the court made findings, and the judgment accorded with the findings. The respondent does not claim either that the findings contain a mistake or that the judgment is not in accord therewith. "Where the judgment accords with the findings, any omission, if error, is judicial rather than clerical error, and while it might have been corrected by changing the findings before entry of judgment, it cannot be remedied by an amendment made after the judgment is entered. This is true even though the findings and judgment as made and entered do not accord with the court's previous intentions." 14 Cal.Jur. 1000, and cases cited.

[5] Furthermore, the answer of the respondent contains the complete record of the trial court in regard to the matter, including all evidence and exhibits which were presented at the hearing. The record, therefore, presents a sufficient case for consideration by this court as one arising on a writ of review, and even if the petitioner be not strictly entitled to a writ of prohibition the court may give such relief as the record presented warrants. 21 Cal.Jur. 634, and cases cited. As was said in Traffic Truck Sales Co. of California, v. Justice's Court, etc., 192 Cal. 377, at page 381, 220 P. 306, 308: "the petition, the answer, and an agreed statement bring here the complete record in the case, in so far as relates to the point involved and the facts relevant to the questions presented for consideration. Under these circumstances, there is no reason why the court should not give such relief as the record so presented will warrant." Taking as true the allegations of respondent's answer (but not including mere legal conclusions therein), the respondent is not entitled to the relief demanded by her in the trial court nor to any relief. A consideration of the case by this court as one arising on a writ of review would warrant a reversal of the contemplated order of the trial court

if made. We should and do decide the question now while the case is before us.

Respondent's demurrer is overruled, and the writ of prohibition is granted.

I concur: GOULD, Justice pro tem.

I dissent: McCOMB, Justice pro tem.



11 Cal.App.2d 517

REPOSA v. PEARCE.

Civ. 9829.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1936.

1. Automobiles ⇐226(1)

Guest who knowingly and intentionally participated in drunken orgy leading up to motorist's intoxicated condition could not recover for injuries received in collision proximately caused by motorist's reckless driving induced by intoxication (St.1931, p. 1693, § 141¾).

2. Negligence ⇐100

While ordinary negligence by plaintiff is no defense upon which defendant may rely when complaint is based upon charge of willful misconduct, where negligence of plaintiff is of such character that it contributes to, and becomes inducing cause of, defendant's willful misconduct, no recovery can be had.

3. Automobiles ⇐181(1)

Under guest statute, "willful misconduct" is different from conduct of motorist superinduced by intoxication, and, when acts of motorist which would be classed as willful misconduct if motorist were not under influence of liquor are induced by use of liquor, motorist's acts are regarded solely as result of drunken driving (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by John Reposa against Carlos Pearce. From an adverse judgment, the plaintiff appeals.

Affirmed.

Larrouy & Macdonald, of Redwood City, for appellant.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries, and defendant had judgment. The appeal is on a bill of exceptions.

The plaintiff and another were riding as guests of the defendant in the latter's automobile when it struck a truck at an intersection. The plaintiff was injured, and his companion was killed. All three were on what may be called a drinking party. They purchased some whisky at Belmont, then drove out to an airport, where they entered a building and continued their drinking until the defendant became badly intoxicated. The plaintiff believed that he was less intoxicated than the defendant, and asked permission to drive the car on the return trip. Defendant at first consented, and plaintiff entered the car and started the motor. The defendant then came out of the building and demanded the right to drive his own car, to which the plaintiff answered, "All right." He testified that the defendant "pushed" him from under the wheel, and that defendant failed to heed his warning when the car was driven at a high speed. All this evidence comes from the plaintiff; the defendant was not produced as a witness at the trial.

The plaintiff sued under the provisions of section 141¾ of the California Vehicle Act (St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693), charging that the collision was the proximate result of the intoxication and the willful misconduct of the defendant. The answer pleaded contributory negligence. The trial court found that the defendant's intoxication and willful excessive speed were the proximate causes of the collision, but that plaintiff himself was negligent, that he continued to ride with defendant well knowing that defendant was intoxicated and not in a fit condition to operate the automobile, and that he did this voluntarily and without protest.

[1-3] We purposely refrain from discussing the technical points raised by the appellant because the case is controlled by the sound principle announced in Schneider v. Brecht (Cal.App.) 44 P.(2d) 662, 664. In holding that the statute did not permit

recovery by a guest under these same circumstances, the court said:

"While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a part of, and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had. * * *

"While the words 'intoxication' and 'willful misconduct' are used in the same sentence, and appear to be conjoined, we think that the intent of the Legislature was that the willful misconduct should be something different and apart from the acts and conduct of one whose reckless driving is superinduced by intoxication, that is to say, if the acts of the driver which would be classed as willful misconduct if not laboring under the influence of intoxicating liquor, when induced and brought about by the use of intoxicating liquor, then and in that case the action is to be regarded solely as the result of drunken driving or driving while one is under the influence of intoxicating liquor, and though the acts apparently are willful, intentional, and reckless, yet, if, as found by the court, they proximately resulted from the use of intoxicating liquor, and the circumstances of the case show that the guest was a participant in the drunken orgy in all the acts and events which led up to the intoxicated condition, recovery cannot be had, for the simple reason that both parties are equally culpable. If the acts and conduct of an intoxicated person can be separated from the condition of the person, and those acts set out and made the basis of an action sounding in willful misconduct, then and in that case the plaintiff is entirely relieved from any liability or responsibility on account of riding with a drunken driver, and the section of the Code, by such construction, would be rendered absolutely nugatory. It cannot be that the Legislature intended that the very acts upon which a court or jury might properly rely to establish the intoxicated condition of the driver, should relieve the plaintiff, knowing of that condition, from any charge of being equally guilty, and permit an action to be founded upon such acts, by naming the acts 'wilful misconduct.'"

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 520

REPOSA v. PEARCE.

Civ. 9934.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1936.

Appeal and error ⇐790(3)

Defendant's appeal from order amending a bill of exceptions was dismissed as moot, where judgment for defendant in the main case was affirmed by District Court of Appeal.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by John Reposa against Carlos Pearce. From an adverse order, the defendant appeals.

Appeal dismissed.

J. E. McCurdy and F. E. Hoffmann, both of San Mateo, for appellant.

Larrouy & Macdonald, of Redwood City, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order amending a bill of exceptions in Reposa v. Pearce (Cal.App.) 54 P.(2d) 475. The amendment was made to include the original statements of indebtedness included in the plaintiff's claim for special damages. Because of the judgment in the main case holding that plaintiff was not entitled to any damages, the question raised here has become moot.

For these reasons, the appeal is dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

11 Cal.App.2d 655

HOFFMANN v. LANE et al. (two cases).

Civ. 9518, 9564.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1936.

Hearing Denied by Supreme Court April 6, 1936.

1. New trial ⇐75(1)

Trial court has broader power to grant new trial than does an appellate tribunal, and may grant a new trial if it is satisfied that award is not legally adequate or commensurate with injuries, and is not limited in exercise of such power to awards so grossly inadequate as to raise inference of passion or prejudice.

2. Appeal and error ⇐1011(1)

Solution of conflict in testimony of medical experts as to nature of plaintiff's injuries and probative effect of such testimony were for trial judge.

3. Damages ⇐99

Injured plaintiff's recovery of damages against negligent defendant for period during which he was unable to work was limited to worth of his service in conduct of business and did not include loss of profits as partner in business.

4. Damages ⇐159(2)

Plaintiff's loss of wages during period of inability to work because of injuries could not be considered as element of damage, in absence of special pleading.

5. Damages ⇐159(3), 172(1)

Under general allegation of damages, court could consider permanent loss to plaintiff resulting from injuries rendering him less capable of following his previous vocation, and in proof of such loss evidence as to earnings from such vocation was admissible.

6. New trial ⇐75(4)

$5,000 for fractures of several lumbar vertebræ, and of both legs, leading to complications and permanent impairment, causing loss of earnings and impairment of ability to work, and necessitating confinement in hospital for 71 days and in bed at home for 60 days, *held* not so adequate as to render trial court's grant of new trial, because of inadequacy, an abuse of discretion.

7. Automobiles ⇐242(6)

In action for injuries sustained in collision with motortruck, inference of driver's permissive use of truck was deducible from defendant's undisputed ownership of truck.

8. Automobiles ⇐244(26)

In action for injuries sustained in collision with truck, driver's implied permission to use truck to take fellow employee home could be inferred from driver's testimony that owner had on frequent prior occasions approved his use of truck for such purpose, and that on present occasion driver had driven truck from owner's coal yard in plain view of person in charge of yard.

9. Automobiles ⇐244(22)

In action for injuries sustained in collision with truck, evidence *held* to sustain finding that driver of truck was using truck with permission of owner.

10. Appeal and error ⇐1173(1)

Where plaintiff, injured in collision with truck, had been granted new trial as to driver of truck because of inadequacy of recovery, truck owner, who had been found jointly liable with driver, *held* entitled to have judgment vacated as to him, and to be allowed to participate in redetermination of negligence of driver.

Appeals from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by E. D. Hoffmann against James Lane, Joe Brasesco, the Parkside Fuel Company, the James Lane Coal Company, and others. From a judgment for plaintiff, the Parkside Fuel Company, the James Lane Coal Company, and James Lane appeal, and, from an order granting plaintiff's motion for a new trial as to the defendant Joe Brasesco, Joe Brasesco appeals.

Judgment in accordance with opinion.

Charles V. Barfield and J. Thaddeus Cline, both of San Francisco, for appellant Joe Brasesco.

Rogers, Clark & O'Brien, William A. O'Brien, and Charles V. Barfield, all of San Francisco, for appellants Parkside Fuel Co., James Lane Coal Co. and James Lane.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Reginald F. McLaren, for respondent.

GRAY, Justice pro tem.

Plaintiff brought this action to recover damages for personal injuries received by him as the result of the negligent operation by defendant Joe Brasesco of an autotruck owned by the defendant James Lane. The jury returned a verdict awarding plaintiff damages against defendant Brasesco in the sum of $5,000, and against de-

fendant Lane in the same amount. Upon plaintiff's motion the court granted a new trial as to the defendant Brasesco upon the ground that the evidence was insufficient to justify the verdict.

Defendant Brasesco appeals from this order granting a new trial. Defendant Lane appeals from the judgment. Since the sufficiency of the evidence to establish defendant Brasesco's negligence is not questioned, it will be unnecessary to state the evidence as to the manner of the happening of the accident.

[1] In support of his appeal, defendant Brasesco argues, as a legal proposition, that a trial judge can set aside a verdict only if its amount is so grossly inadequate as to leave no reasonable doubt that it is the result of passion or prejudice, or that it is contrary to the evidence and constitutes a clear abuse of the discretion of the jury. He denies the power of a trial judge to grant a new trial because he disagrees with the amount awarded by the jury. On this legal basis, he further argues that a comparison of the injuries shown by the evidence with awards for similar injuries, as reported in cited cases, demonstrates that the trial judge abused his discretion in granting a new trial. Not only is his legal premise incorrect, but his comparison is also faulty. The rule, as stated by him, is applicable to an appellate court when passing upon the propriety of a trial court's ruling upon a motion for a new trial. Phillips v. Lyon, 109 Cal.App. 264, 292 P. 711. But, as this court pointed out in Peri v. Culley, 119 Cal.App. 117, 6 P.(2d) 86, a trial court possesses much broader power in this regard than does an appellate tribunal. It was there decided that a trial judge may grant a new trial if he is satisfied from the evidence that the award is not legally adequate or commensurate with the injuries, and he is not limited in the exercise of such power to awards so grossly inadequate as to raise an inference of passion or prejudice.

[2-6] For purposes of comparison, he relies solely on his doctor's description of plaintiff's injuries. The testimony of defendants' medical expert, based in part upon his reading of the X-rays, described plaintiff's injuries as less severe in their extent and less serious in their consequences than did his attending physician. The solution of this conflict and the probative effect of the testimony were matters confided in the trial judge. Peri v. Culley, supra. He could, as it must be assumed he did, accept the testimony of plaintiff's doctor and reject that given by defendants' expert. According to the former, plaintiff, in his left leg, suffered a compound fracture of the tibia, with three fragments of bone, and a comminuted fracture of the fibula, with five fragments. This leg became infected and was drained from numerous incisions for two months. It also developed ankylosis of the intermediary fragment. In his right leg, plaintiff sustained two major fractures of the tibia with a depression and multiple fractures of the fibula with considerable displacement. At the time of trial, this leg was 1 inch shorter than the other, and had also developed ankylosis. A previous mild arthritis in both knee joints was accentuated to severity by his injuries. He also received fractures in the transverse processes of the first, second, and third lumbar vertebræ and a possible fracture of the lamina of the fifth lumbar vertebræ. At the trial he walked with the aid of a cane, had a decided limp, and movements were painful. His knee movements were limited to 70 degrees, out of a normal of 120 degrees, causing difficulty in the use of stairs and decreasing his stability. He had been confined 71 days in the hospital and 60 days in bed at home. Necessarily he suffered great pain as the result of his injuries. To establish a standard of average awards for similar injuries with which to measure the present one, defendant cites early cases in each of which an appellate court had refused to vacate a verdict as excessive, after the trial court had denied a new trial on that ground. In reply, plaintiff cites later cases for larger awards, where similar action was taken. Since the considerations governing a trial court's determination as to the adequacy of an award differ so widely from those controlling an appellate court's decision as to its excessiveness, amounts which the latter have held not excessive offer but a poor standard with which the former can measure an award so as to pass upon its adequacy.

But there were other elements of damages shown by the evidence. It is undisputed that plaintiff incurred a debt of $213 to the county hospital. It is also apparent that plaintiff not only had lost earnings, but that his ability to work was impaired. He testified that at the time of the accident he was one of three partners, engaged in the business of delivering cakes and cookies

direct to the home; that during the previous year he as such partner had earned an average of $60 a week, and for the year prior to that, an average of $75 a week; and that from the date of the accident to the time of trial (11 months) he had been unable to work and had received nothing from the business. From these facts plaintiff incorrectly reasons that the trial court could have considered that he was entitled to recover wages for 11 months at the rate of $60 a week. The loss of profits from the partnership was not a necessary consequence of plaintiff's injuries, and the extent of his recovery would be the worth of his services in the conduct of the business. Such element of damages must be specially pleaded, which he failed to do. Lombardi v. California St. Ry. Co., 124 Cal. 311, 57 P. 66. Under his general allegation of damages, the court could have considered the permanent loss to him because the injuries rendered him less capable of following his previous vocation, and in proof of such loss, evidence as to earnings from such vocation was admissible. Shaw v. Southern Pacific R. R. Co., 157 Cal. 240, 107 P. 108; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Under the evidence it cannot be said that the court abused its discretion in granting a new trial because of the inadequacy of the amount awarded.

[7-9] The complaint charged that the defendant Lane was responsible for the negligence of the defendant Brasesco because either (1) the latter was operating the former's autotruck as his employee, at the time of the accident, or (2) the former, knowing the latter's incompetency, negligently intrusted him with the operation of the autotruck, or (3) the latter was using the former's autotruck with his permission. The case was tried upon such issues of liability. In his opening brief defendant Lane treats as unnecessary the discussion of whether the verdict may not be sustained by implied findings favorable to plaintiff upon the first two issues, and of whether the evidence is sufficient to support such findings. Plaintiff's reply brief contends that the evidence does support such findings, and that therefore the verdict must stand. Defendants' closing brief concedes the force of such contention. But defendant Lane in his briefs argues that because the trial court granted a new trial solely as to the defendant Brasesco and allowed the judgment against defendant Lane to stand it did not believe that the evidence established Lane's liability on the first two theories but believed such liability rested upon proof of the third. So interpreting the verdict, he then argues that the evidence does not support a finding that he permitted Brasesco to use his autotruck. In support thereof he relies upon the testimony of his witnesses, which supports his claim that such permission was not given. However, he ignores the testimony of Brasesco upon which the plaintiff relies. The jury could accept as true this latter testimony and reject other testimony in conflict therewith. It will be assumed in the consideration of this argument that the verdict may be so construed in the light of the supposed action of the court. If Brasesco's testimony shows that Lane gave his permission the verdict is also sustained on the third issue. An inference of permissive use of the autotruck is deducible from Lane's undisputed ownership of it. Pozzobon v. O'Donnell, 1 Cal.App. (2d) 151, 36 P.(2d) 236. The defendant Brasesco testified that in the absence of the defendant Lane, but within the plain view of the person left in charge of Lane's coal yard, he drove the truck from the coal yard in order to take a fellow employee home, and that the defendant Lane had on frequent prior occasions approved his use of the truck for such purpose. Implied permission may be inferred from such use. Phillips v. Cuccio, 5 Cal.App.(2d) 520, 42 P.(2d) 1050; Phipps v. Shacklett, 137 Cal.App. 109, 29 P.(2d) 917. Even in the view of contradictory evidence produced by the defendant Lane, the jury could have found in accordance with these inferences. Phillips v. Cuccio, supra.

[10] Both defendants assign as error the granting of a new trial as to the driver without including therein the owner. The defendant Brasesco has not shown nor is it clear how he could be injured by a limited retrial. The defendant Lane, as to whom the judgment was allowed to stand, was seriously affected by the restriction. The granting of a new trial as to one of several independent tortfeasors, found jointly liable for negligence, does not vacate the judgment against the remainder. Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 P. 178. But if the rights and liabilities of the co-defendants are interdependent or those of one are entirely dependent on the other, the judgment should be treated as an entirety, and, if vacated as to the one upon

whom the other's rights depend, also as to the latter. Bishop v. Superior Court, 59 Cal.App. 46, 209 P. 1012; Hamilton v. Prescott, 73 Tex. 565, 11 S.W. 548; Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S.W. 509. The defendant Lane could not be held liable as owner of the auto-truck upon either of the three theories advanced by the plaintiff until the negligence of the defendant Brasesco as a proximate cause of plaintiff's injuries had been established. The order granting a new trial as to defendant Brasesco did not limit the issues to be retried, and therefore the question of his negligence was left undetermined. Hence the defendant Lane was entitled to participate in the redetermination of that issue. In Bishop v. Superior Court, supra, and in Kent v. Williams, 146 Cal. 3, 79 P. 527, an order granting a new trial as to the defendant upon whom the rights of a codefendant depended was construed as vacating the judgment against the latter, although the order did not so expressly provide. To remove any doubt, however, the judgment against defendant Lane is reversed and the order granting a new trial is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



11 Cal.App.2d 521

McBRIDE v. McBRIDE.

Civ. 9886.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1936.

1. Husband and wife ⇐272(1)

Where divorce decree failed to make any disposition of interests of the community in benefits created by certificate of insurance, wife became owner of one-half of such community interest as tenant in common with former husband.

2. Husband and wife ⇐249

Where life policy had been issued upon life of husband during coverture and premiums thereon paid from community funds, policy was a community asset, and act of husband in changing beneficiary without wife's consent constituted gift to new beneficiary to extent only of husband's community interest in policy.

3. Husband and wife ⇐249

Where divorced husband, without consent of former wife, had substituted new wife for former as beneficiary of life policy which had been subscribed to during former coverture and paid for from community funds, former wife *held*, upon husband's decease, entitled to that proportion of one-half of proceeds of policy as funds of the community paid for, notwithstanding husband had right to change beneficiary without wife's consent and that insurer was an assessment company.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Helen St. John McBride against Opal A. McBride. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Burke, Hickson, Burke & Marshall and Daniel G. Marshall, all of Los Angeles, for appellant.

George L. Flagg, of San Diego, for respondent.

SHINN, Justice pro tem.

Appeal from a judgment of the superior court of Los Angeles county in an action to recover proceeds of an insurance policy as community property.

The following facts are established by the findings:

While plaintiff was the wife of George Thomas McBride, there were paid from their community funds to Navy Mutual Aid Association insurance premiums in the sum of $500.74, upon a policy of insurance in the amount of $7,700, payable to the beneficiary in the event of the death of George Thomas McBride. These premiums were paid between 1926 and 1931, while the husband and wife were domiciled in the state of California. The original beneficiaries were plaintiff and the two minor children of herself and husband, but about a year after the policy was issued plaintiff became the sole beneficiary. On October 14, 1930, plaintiff obtained an interlocutory decree of divorce from her husband, and a final decree on October 15, 1931. No disposition was made in the divorce action of any benefit to be derived from the certificate of membership in the association.

On October 17, 1931, George Thomas McBride married the defendant. On September 30, 1931, without the consent of plaintiff, defendant was made beneficiary in the certificate of insurance. Following his marriage to defendant, the insured paid additional premiums in the amount of $31.-56. Upon his death there was paid to defendant, as beneficiary, the sum of $7,694.-10. Plaintiff sues for the sum of $3,618.95, which is one-half of the share of the insurance paid for with the community funds of plaintiff and the insured. Judgment was given in favor of the defendant, and plaintiff appeals.

[1] When the final decree of divorce was granted to plaintiff, which did not adjudicate the rights of the parties in, or make any disposition of the interests of, the community, in benefits created by the certificate, plaintiff became the owner of one-half of such community interest as a tenant in common with her former husband. In re Estate of Brix, 181 Cal. 667, 186 P. 135; Tarien v. Katz, 216 Cal. 554, 15 P. (2d) 493, 85 A.L.R. 334.

Respondent advances, as reasons for affirmance of the judgment, the following: (1) That the insured had a right to name a second beneficiary without the consent of the first one; (2) that the beneficiary under such circumstances had no indefeasible rights to the proceeds of the policy, but only rights which might be defeated by the substitution of a new beneficiary; (3) that the contract of insurance had successive terms of existence, each consisting of a single year or assessment period, and that therefore a contract existed during each period in which assessments were paid, wholly unrelated to former contract periods. From these premises respondent argues that plaintiff had no interest in the proceeds of the insurance purchased and paid for during the assessment period in which the insured died, and therefore that the judgment properly denied plaintiff any part of such insurance.

Under the by-laws of the association, the insured had the right to name defendant as beneficiary without the consent of plaintiff. Plaintiff had no right to recover upon the certificate of insurance as a beneficiary thereunder. These facts are admitted by plaintiff. But plaintiff does not seek to recover as a beneficiary. Her claims are based upon the fact that the membership was maintained from 1926 to 1931 by the use of community funds of herself and her husband, and she sues for her community interest in the benefits which these funds purchased.

[2] It is well-settled law of this state that a policy of insurance issued upon the life of a husband, after coverture, premiums upon which are paid from community funds, is a community asset; that, if the right is given to the insured to, and he does, change the beneficiary, without the latter's consent, his act in so doing constitutes a gift to the new beneficiary to the extent of the husband's community interest in the policy, but the husband cannot in this manner, without the consent of the wife, bestow upon the new beneficiary the community interest of the wife. New York Life Insurance Co. v. Bank of Italy, 60 Cal.App. 602, 214 P. 61; In re Estate of Castagnola, 68 Cal.App. 732, 230 P. 188; Union Mutual Life Insurance Co. v. Broderick, 196 Cal. 497, 238 P. 1034. The substitution of defendant, as beneficiary, therefore, was effective as a gift of the husband's interest in the insurance represented by the membership certificate, but it did not divest the wife of her community interest therein.

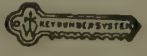
[3] Defendant further argues that, because the husband had a right to change the beneficiary, without the latter's consent, all rights of the latter terminated when such change was made as fully as though the contract had been canceled. It is also argued that, because the insurer was a so-called assessment company, each new premium payment initiated a new policy of insurance. There is no merit in these contentions. The contrary was expressly declared in New York Life Insurance Co. v. Bank of Italy, supra, and in Modern Woodmen of America v. Gray, 113 Cal.App. 729, 299 P. 754, 755. In the latter case the facts were that the insured paid the premiums upon an insurance certificate from 1898 until 1923, when he married. Thereafter there were paid from community funds four quarterly premiums. Upon the death of the insured, the wife claimed the entire proceeds as community property, under the same theories respondent advances here. In denying the claim of the wife, the court said: "While the right of his beneficiaries to receive the proceeds of the policy was dependent upon his continuing to pay the accruing premiums thereon, nevertheless he had acquired the right to have the contract of insurance continued in force by virtue of the payment of pre-

miums from its issuance to him in 1898 until the date of his second marriage in 1923. This was a valuable right in the eyes of the law, and it would be unreasonable to hold that the payment of the premiums after 1923 from community funds would convert the entire proceeds of the certificate of insurance into community property." Accordingly the community share was determined to be only such proportion of the proceeds of the policy as the funds of the community paid for.

The share of the insurance to which plaintiff is entitled should have been computed and awarded to her on the same basis. 500.74/532.30ths of $7,694.10 amounts to $7,237.91, of which plaintiff was entitled to one-half, on account of her com munity interest therein, or $3,618.95. Defendant, having collected all of the insurance, is indebted to plaintiff for her share thereof. The findings, therefore, do not support the judgment in defendant's favor.

The judgment is reversed, with directions to enter judgment in favor of plaintiff and against defendant for the sum of $3,618.95, and costs of suit.

We concur: YORK, Acting P. J.; DORAN, J.



17 Cal.App.2d 570

WHITE v. WHITE et al.*

Civ. 5519.

District Court of Appeal, Third District, California.

Feb. 1, 1936.

Rehearing Denied March 2, 1936.

Hearing Denied by Supreme Court March 31, 1936.

1. Auctions and auctioneers ⇐10

Evidence *held* to justify order denying application for payment of alleged auctioneer's lien on proceeds of sale of community property arising under contract with husband, based on finding that lien was relinquished by agreement with receiver by whom auctioneer was finally employed and that auctioneer was fully paid by receiver for services.

2. Appeal and error ⇐1011(1)

Reviewing court may not interfere with discretion of trial court in determining facts based on conflicting evidence, even though evidence is presented by affidavits only.

3. Liens ⇐22

Suit to establish and satisfy lien contemplates filing of appropriate pleadings in action in which claimant is party.

4. Liens ⇐18

Statutory lien may be enforced only in manner prescribed by statute (Civ.Code, § 3052).

5. Liens ⇐22

Lienholder who is not in possession of property upon which equitable lien is claimed must establish claim and procure order to sell property and satisfy debt in some appropriate proceeding based on adequate pleadings.

6. Auctions and auctioneers ⇐10

Auctioneer asserting lien against proceeds of sale of community property *held* not entitled to order for payment of debt from proceeds of sale in divorce suit between husband and wife to which auctioneer was not party and in which he had not intervened (Civ.Code, § 3052).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Pauline Starke White against Jack White and others, wherein Lewis S. Hart filed a petition for an order directing the receiver to pay petitioner commissions to satisfy asserted lien on proceeds of sale of personal property involved in suit. From an order denying the application, the petitioner appeals.

Affirmed.

Carl B. Sturzenacker, of Los Angeles, for appellant and J. W. Rosenthal, receiver.

I. B. Kornblum and Spencer Austrian, both of Los Angeles, for respondent Pauline Starke White.

H. A. Goldman and Burnett Wolfson, both of Los Angeles, for respondents Jack White and others.

Mr. Justice THOMPSON delivered the opinion of the court.

Lewis S. Hart (also named as Louis S. Hart) has appealed from an order denying his application for an order directing the receiver in this action to pay him auctioneer's commissions in the sum of $1,500 to satisfy an asserted lien on the proceeds of sale of personal property which is involved in this suit. It is claimed this lien

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 56 P.(2d) 202.

was created by a contract of employment which the appellant had with one of the litigants. The application for payment was based on an order to show cause which was determined on conflicting affidavits. The appellant was not a party to this suit and did not intervene therein.

This suit was brought to cancel a written agreement settling the property rights between Pauline Starke White and Jack White, her husband, on the ground that the contract was procured by fraud. The complaint alleges that in a prior suit Mrs. White was granted an interlocutory decree of divorce from Jack White on June 23, 1931, but that the court failed to adopt the terms of the agreement settling property rights between them, and that their property rights have not been determined.

The complaint prays for a settlement of these property rights and for distribution to the spouses of their allotted portion thereof. The complaint also asks for a sale of the property if necessary and partition of the proceeds thereof, and that a receiver be appointed to take charge of the property pending the litigation. Lewis S. Hart was not a party to this action. He did not intervene therein. The defendants answered the complaint. Subsequently they filed a written confession of judgment. Thereafter, on May 19, 1933, an interlocutory judgment on the pleadings was rendered against the defendants. The written agreement settling property rights was canceled on the ground that it was procured by fraud. The property was directed to be sold and the proceeds thereof distributed equally between the spouses. Joseph Rosenthal was appointed receiver to take charge of the property and sell it as directed by the court. This appellant, Lewis S. Hart, was employed by the receiver as an auctioneer to sell the property at public auction. He sold the property and paid the proceeds of sale to the receiver. His commissions as auctioneer were fully paid.

August 5, 1933, the court made an order in this proceeding directing Pauline Starke White, Jack White, and Mr. Rosenthal, the receiver, to show cause why Lewis S. Hart should not be paid $1,500 from the proceeds of sale of the property to satisfy his alleged lien thereon for commissions as auctioneer for selling the property pursuant to a former agreement of employment as auctioneer which he had with Jack White. The order to show cause was heard and determined on affidavits. The affidavit of Hart avers that on April 22, 1933, Jack White employed him as auctioneer to sell the community property involved in this suit in consideration of commissions amounting to 10 per cent. of the gross receipts of the sale, together with the further sum of $150 to be expended for advertising the sale; that the affiant then advanced to Jack White the sum of $1,500, evidenced by a receipt therefor "to be repaid out of the first proceeds from said auction"; that the personal property was thereafter sold by affiant at public auction and the proceeds therefrom paid to Mr. Rosenthal, the receiver, who is now possessed of community funds of the spouses in excess of $1,500; that said sum of $1,500 has not been repaid to affiant and said receiver refuses to pay the same; and that affiant is entitled to a lien on said funds to secure the payment of the money so advanced to Jack White.

A counteraffidavit was filed by Joseph Rosenthal in which he avers that as the duly appointed receiver of the personal property involved in this suit he employed Lewis S. Hart, as auctioneer, to sell the property at public auction, and that the property was subsequently sold and the proceeds thereof were paid to him as receiver and are now retained by him in a sum in excess of $1,500. The affiant denies that the property was sold by Mr. Hart pursuant to his previous contract of employment with Jack White and upon the contrary avers that Hart was employed by him as auctioneer with the distinct understanding that he was not acting as auctioneer under his former agreement with Jack White; that the former agreement was not to be recognized as valid; that Mr. Hart sold the property at public auction as the agent of affiant and not otherwise; and that he had been fully paid for his services as auctioneer. The affidavit avers in that regard: "Your receiver, pursuant to the order of the court heretofore made, hired and engaged Louis S. Hart as his agent to sell said furniture at public auction upon the express understanding that said receiver did not recognize * * * any contract entered into between Louis S. Hart and Jack White, and upon the express understanding that Louis S. Hart in making said sale acted solely and exclusively as agent and representative of your receiver * * * (and that) your receiver has paid to Louis S.

Hart his compensation for acting as agent of your receiver."

[1] Upon the hearing of the order to show cause and on consideration of the affidavits aforesaid, the court ordered that the application of Lewis S. Hart to require the receiver to pay him $1,500 and interest in satisfaction of his alleged lien on the proceeds of sale of the personal property, be denied. The order is evidently founded on the affidavit of Rosenthal averring that Hart was employed by him as receiver to sell the property as auctioneer, and that he did so as the agent of affiant and not pursuant to the former employment by Jack White; that it was agreed between affiant and Hart that the former contract of employment was not to be recognized as valid, which implies that Hart agreed to waive his alleged lien; and finally that Mr. Hart had been fully paid for his service as auctioneer for the security of which it is claimed the lien exists. Upon this affidavit the court was warranted in finding that the alleged lien was relinquished by agreement when the final contract of employment was consummated, and that the appellant was fully paid for his services as auctioneer which satisfies the lien.

[2] The appellant's application for payment of the money and satisfaction of his alleged lien was determined on conflicting evidence. This court is, therefore, bound by the decision of the trial court. An appellate court may not interfere with the discretion of the trial court in determining facts based on conflicting evidence, even though that evidence is presented by affidavits only. Zuver v. General Development Company, 136 Cal.App. 411, 28 P.(2d) 939.

[3, 4] The present proceeding appears to be an effort to establish and satisfy an alleged lien on specified property created by a written agreement. There are no pleadings upon which the creation of such a lien or the satisfaction thereof may be founded. The claimant is not a party to the action in which this remedy is sought. He did not intervene in this suit. No petition was filed therein purporting to state the facts upon which the claimant relies. A mere order to show cause was issued herein. The claimant was not in possession of the property. A suit to establish and satisfy a lien certainly contemplates the filing of appropriate pleadings in an action in which the claimant is a party. A statutory lien may be enforced only in the manner prescribed by statute. 16 Cal.Jur. 351, §§ 50 and 51; § 3052, Civ.Code; Peerless Insurance & Brokerage Co. v. Dwyer Equipment Co., 78 Cal.App. 141, 248 P. 303. We assume that the claimant in this proceeding relies on an equitable lien created by express agreement. It is said in 16 Cal.Jur. 308, § 10, that: "Every express agreement upon a valuable consideration received whereby the contracting party sufficiently indicates an intention to make some particular property therein described or identified a security for a debt or other obligation, creates an equitable lien upon the property."

In 18 Standard Encyclopedia of Procedure, p. 1000, § C, it is said: "Whenever the lien is a matter of contract between the parties, equity always has jurisdiction to enforce the same for every such lien or charge in rem constitutes a trust and is governed by the general doctrine applicable to trusts."

[5] There is no statute in California authorizing the possessor of an equitable lien on personal property for the payment of a debt to sell the property to satisfy the debt unless he is lawfully in possession of the property. When the lienholder is not in possession of the property and claims an equitable lien thereon to satisfy his debt, it is necessary for him to establish his claim and procure an order to sell the property and satisfy the debt in some appropriate proceeding based on adequate pleadings. 37 C.J. 345, § 75. It is said in 16 Cal.Jur. p. 351, § 50: "In the absence of statutory provision upon the subject one holding a common-law lien as security for a debt has no right to sell the property by virtue of the lien, either in law or equity, the liens being enforced by obtaining a judgment for the charges and levying an execution upon the goods." Stewart v. Naud, 125 Cal. 596, 58 P. 186.

[6] In the present case the claimant was not a party to this action, and there are no pleadings upon which the court had jurisdiction to establish the alleged lien or direct its satisfaction.

We are cited to no authority authorizing the unprecedented procedure which was followed in this case.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

11 Cal.App.2d 594

CRIDER v. CRIDER.

Civ. 10802.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1936.

Hearing Denied by Supreme Court April 2, 1936.

1. Divorce ⇐309, 312

In divorce proceeding, court retains power to modify custodial orders respecting minor children, and applications with regard thereto are addressed to sound discretion of court, whose conclusions will not be disturbed except upon clear showing of abuse of discretion.

2. Divorce ⇐309

On hearing to permit divorced husband to have sole custody of 7 year old son for 30 hours each alternate week, refusal to hear evidence concerning matters antedating filing of divorce suit and which were approximately 5 years remote *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Elmer J. Crider against Emma B. Crider. From an order, defendant appeals.

Affirmed.

Charles E. Hobart, of Los Angeles, for appellant.

Earl A. Everett, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Defendant appeals from an order permitting her divorced husband, plaintiff herein, to have the sole custody of their 7 year old son for a period of 30 hours each alternate week. The order appealed from was in modification of custodial orders in the interlocutory and final decrees of divorce.

[1, 2] We find no merit in the appeal. In divorce proceedings the court retains power to vary and modify custodial orders respecting minor children. Applications with regard thereto are peculiarly addressed to the sound discretion of the court, and its conclusion will not be disturbed except upon a clear showing of abuse of discretion. Crater v. Crater, 135 Cal. 633, 67 P. 1049. Such discretion was not abused in this case by the refusal of the trial court to hear evidence concerning matters antedating the filing of the divorce suit and which were approximately five years remote. The court was interested primarily in developments after the date of the divorce trial and in the status, condition and fitness of the parties at the time of the hearing for modification of the order. Olson v. Olson, 95 Cal.App. 594, 272 P. 1113.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 674

JOHNSON v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 10433.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1936.

Master and servant ⇐416

Where direct evidence showed that claimant had no hernia prior to date of accident, Industrial Commission *held* without jurisdiction to make award based on determination, from testimony received in former cases where similar question was involved, that claimant had pre-existing hernia.

Petition for writ of certiorari by Norman Johnson against the Industrial Accident Commission of the State of California, to review an award of compensation by the Commission under the Workmen's Compensation Act.

Award annulled.

Louis Elowitt, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

HOUSER, Presiding Justice.

In this matter it appears that in the course and arising out of his employment, Norman Johnson, the petitioner herein, fell against the corner of a table, and thereby sustained an injury in the region of his right groin. On a hearing of Johnson's application for adjustment of his claim for compensation before the respondent

commission, in addition to the foregoing facts, the said respondent found that Johnson's said injury consisted of an "aggravation in to disabling condition of a pre-existing hernia," and ordered that he be compensated "by the furnishing of a surgical operation for the radical cure of said hernia by the insurance carrier, together with the necessary medical and hospital treatment, without disability indemnity for the period of disability caused thereby."

In substance, by his petition for the writ of review herein, Johnson has questioned the sufficiency of the evidence to justify such finding of fact and the award made by the respondent commission thereon.

As a controlling point regarding the sufficiency of the evidence, from the testimony given by one physician it appears that several months before the date of the injury Johnson "was operated for an acute purulent appendicitis," and that at that time he was not afflicted with hernia; but that immediately following the date of the accident in question he had a "definite hernia." However, by testimony given by another physician, the latter fact in part was disputed, with the qualification that possibly there was "some mild separation of the muscular fasciculi in the region of the right internal inguinal ring."

It thus appears that there was no conflict in the direct evidence regarding the fact that prior to the date of the accident Johnson never had had a hernia; the only conflict being as to whether since the date, and as a result, of the injury, he had a hernia. In fact, no evidence whatsoever was introduced on the hearing before the respondent commission to the effect that Johnson had a "pre-existing hernia."

The only basis for the finding by the respondent commission that there was "a pre-existing hernia" is the testimony, reports, etc., now asserted to have been received in former cases before the respondent commission where a similar question was involved, and which testimony, etc., are now claimed to disclose the fact that a hernia seldom results directly from an injury; but that in the great majority of cases the injury aggravates a pre-existing condition and produces a hernia. But as hereinbefore has been indicated, no evidence of what was contained in any such testimony, reports, etc., was introduced at the hearing before the respondent commission.

It is manifest that in accord with the report of one physician the respondent commission was justified in finding that after the date of the accident Johnson had a hernia; but since there was no direct evidence that that condition was pre-existing, and since Johnson was given no notice of any intention on the part of respondent commission to use the evidence now asserted to have been received in former cases, nor given an opportunity to refute any such evidence, it follows that the respondent commission was lacking in jurisdiction to decide the question as to a pre-existing hernia contrary to the direct evidence that was introduced on the hearing in Johnson's case.

The award is annulled, and the matter is referred to the respondent commission for appropriate action in the premises.

We concur: YORK, J.; DORAN, J.



11 Cal.App.2d 644

CRAIG v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 10650.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1936.

1. Insurance ⇐268

Where statement in application is declared by policy to be warranty and insured declares statement is true, falsity thereof voids policy ab initio.

2. Insurance ⇐286

False statement in application for burglary policy that no burglary insurance applied for or carried by insured had been declined or canceled by any company within past five years *held* to render policy issued thereon void ab initio where statement was expressly declared in policy to be part thereof and to constitute a warranty.

CRAIL, P. J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Adaline C. Craig against the United States Fidelity & Guaranty Compa-

ny. Judgment for defendant, and plaintiff appeals.

Affirmed.

Ernest N. Clark and William J. Claassen, both of Los Angeles, for appellant.

Armand H. Blum, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of defendant after a trial before a court without a jury.

The conceded facts are:

Plaintiff, acting through her duly authorized agent, applied to defendant for a burglary insurance policy, which was duly issued October 10, 1934. In answering item No. 13 in the application for insurance reading "No burglary, theft, or robbery insurance applied for or carried by assured has been declined or cancelled by any company within the last five years except as herein stated," the agent declared, "No exceptions." This statement was in fact false, because a policy of burglary insurance held by plaintiff had been canceled on or about July 20, 1934, by the Ætna Insurance Company.

November 6, 1934, plaintiff's premises were burglarized. Thereafter, upon learning of the false statement, defendant canceled its policy of burglary insurance with plaintiff. It is to recover for this loss that the suit was commenced.

The sole question necessary for us to determine is: Does a false statement in an application for burglary insurance, that prior burglary insurance carried by plaintiff has not been canceled within the preceding five years, constitute a valid defense to a suit for recovery on the policy?

[1] It is well settled that, when a statement in the application for insurance is declared by the policy to be a warranty and the insured declares the statement is absolutely true, the falsity of such statement voids the policy ab initio (Wolverine Brass Works v. Pacific Coast Casualty Co. of San Francisco, 26 Cal.App. 183, 184, 146 P. 184; Kahn v. Royal Indemnity Co., 39 Cal.App. 180, 183, 178 P. 331), and the question of the materiality of the false statement is removed from the consideration of the court. One of the principal reasons for such warranty is to preclude all controversy as to the materiality or immateriality of the statement. McKenzie v. Scottish Union & National Insurance Co., 112 Cal. 548, 555, 44 P. 922.

[2] In the instant case paragraph R of the insurance policy reads: "The statements in items 1 to 13 inclusive in the declarations are made the basis of this insurance and the assured by the acceptance of this policy warrants them to be true. This policy is issued in consideration of such statements and the payment of the total premium."

Item 13 of the application for insurance is: "No burglary, theft, or robbery insurance applied for or carried by assured has been declined or cancelled by any company within the last five years except as herein stated." The answer was, "No exceptions." It is conceded that the answer to this declaration was false.

The answer to the question in the application for insurance was expressly declared to be a part of the policy of insurance and a warranty. Thus, since it was untrue, the policy was void ab initio, and judgment was properly entered for the defendant.

Because of our conclusion, it is unnecessary for us to consider the other propositions advanced by plaintiff.

The judgment is affirmed.

I concur: WOOD, J.

CRAIL, Presiding Justice (dissenting in part).

I concur in the result, but I dissent as to the law above stated to this extent, that I believe it is the law of California that no right to avoid or rescind a subsisting insurance policy occurs from the violation of any provision thereof, even though it be an express warranty, unless such warranty is a material one, except in cases where the policy itself declares that such breach shall avoid it. Sections 2610 and 2611, Civ. Code, now sections 447 and 448, Insurance Code; Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859; Victoria S. S. Co v. Western Assurance Co., 167 Cal. 348, 357, 139 P. 807, and cases cited in 14 Cal.Jur. 493, 494.

Nevertheless, in the instant case there was substantial evidence to sustain the finding of the trial court that the warranty was a material one, including evidence that the defendant would not have issued the policy in question if it had known the falsity of the warranty, and also evidence to the effect that the policy which was canceled by the Ætna Insurance Company was can-

celed because it received confidential investigation reports which were of such nature and so unsatisfactory from the standpoint of the moral hazard that the company was compelled to and did make a cancellation thereof. There was other evidence of the materiality of the warranty in question. Materiality of such a warranty is to be determined solely by the probable and reasonable influence of the facts upon the party, to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract or in making his inquiries. Civ.Code, § 2565, now Ins.Code, § 334. Obviously, there was substantial evidence to sustain the finding that the warranty was a material one.

The plaintiff complains because the credit reports themselves, which were referred to above, were not presented by the defendant. But no objection was made in the trial court to the testimony with regard to the credit reports as given, although plaintiff admits "that the record discloses that the defendant had available to it actual and definite evidence," i. e., the reports themselves. Neither did the plaintiff on cross-examination ask for an inspection of the credit reports. Objection cannot be raised for the first time on appeal with regard to such evidence. The plaintiff also complains of a ruling of the trial court with regard to the admission of an answer made by one of the witnesses as an expert, but I am satisfied that there was no miscarriage of justice in this case arising out of said answer, and that we should not interfere with the judgment in view of the admonition contained in article 6, § 4½ of the Constitution.



11 Cal.App.2d 633

LYNCH et al. v. CITY OF LOS ANGELES.

Civ. 10429.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1936.

Municipal corporations ⇐741(1)

Proper authority with whom to file claim against city of Los Angeles for personal injuries is city clerk for presentation to city council, not board of public works (Gen.Laws 1931, Act 5149; Los Angeles Charter, §§ 363, 376).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Agnes Lynch and another against the City of Los Angeles. Judgment for defendant, and plaintiffs appeal.

Reversed, with direction.

Max Schleimer and Jack Greenberg, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondent.

ROTH, Justice pro tem.

The decisive question presented by this appeal is whether plaintiffs' claims for personal injuries suffered as a direct consequence of the negligence of defendant and respondent city of Los Angeles were duly presented in accordance with sections 363 and 376 of the city charter of the City of Los Angeles and Act No. 5149 of Deering's General Laws, in order to comply with the conditions precedent necessary to the bringing of this action.

Within 90 days after their respective causes of action had accrued, plaintiffs filed their claims for personal injuries sustained on December 23, 1933, through the city's negligence with the city clerk of the city of Los Angeles for presentation to the city council. These claims were by the city council rejected on May 3, 1934. Respondent contended in the trial court that the claims should have been first presented to the board of public works, in accordance with section 363 of the city charter. The court sustained that contention, and gave judgment for respondent. The trial court, however, found as facts that the injuries sustained by plaintiffs were the direct consequence of the negligence of respondent; that plaintiffs were and each of them was free from negligence; and that the damages suffered by plaintiff Agnes Lynch were $2,765.50, and those suffered by plaintiff Ida C. Percival were $672.

It has been repeatedly held in a number of recent cases that the presentation of a claim to the city council on facts similar to those in the case at bar is a sufficient compliance with the charter provisions and with the general law. Musto-Keenan Company

v. City of Los Angeles, 139 Cal.App. 506, 515, 516, 34 P.(2d) 506; Haigh v. City of Los Angeles, 139 Cal.App. 595, 599, 34 P.(2d) 779. In both of these last-named cases hearings by the Supreme Court were denied. To the same effect are Robertson v. City of Los Angeles (Cal.App.) 44 P.(2d) 461; Douglass v. City of Los Angeles (Cal.App.) 44 P.(2d) 463; Rogers v. City of Los Angeles (Cal.App.) 44 P.(2d) 465; Skinner v. City of Los Angeles (Cal.App.) 44 P.(2d) 467. Any confusion which may have existed as to what is the proper procedure is definitely clarified by the opinion of the Supreme Court in the foregoing case of Douglass v. City of Los Angeles, in which case a hearing was granted by the Supreme Court, and in which said court, in a learned and exhaustive opinion recently filed [53 P.(2d) 353], reviews the cases and holds that the proper authority with which to file a claim, based on the facts such as those in the case at bar, is the city clerk for presentation to the city council.

The judgment is reversed, and since there is no dispute as to the facts, the trial court is directed to enter judgments for appellants, respectively, in accordance with its findings of fact already made on the issue of damages, with interest on each of said judgments from the date of entry of the judgment from which this appeal is taken.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 614

ALAMITOS LAND CO. v. TEXAS CO.

Civ. 10786.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1936.

1. Mines and minerals ⇐79(3)

Transaction whereby "wet" gas from leased premises was delivered by lessee to petroleum corporation where it was commingled and treated for production of gasoline, payment to lessee, being 45 per cent. of gasoline manufactured, constituted not a "bailment" but a "sale" of gas within lease providing that if lessee sold gas lessor should receive one-fifth of amount received therefor, rather than one-fifth royalty for gas produced.

[Ed. Note.—For other definitions of "Bailment" and "Sale," see Words & Phrases.]

2. Account stated ⇐4

Where lessee contracted to pay lessor one-fifth of amount received for gas which was sold by lessee, monthly settlements between lessor and lessee which disclosed entire nature of transaction between lessee and its buyer amounted to series of accounts stated, and, by accepting payment without objection, lessor could not later question transaction between lessee and buyer as not constituting "sale" under lease contract.

3. Limitation of actions ⇐54(4)

Claim by lessor for money allegedly due from lessee under oil lease, which arose more than 4 years before commencement of action, *held* barred by limitations.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Alamitos Land Company against the Texas Company. From an adverse judgment, the plaintiff appeals.

Affirmed.

Oliver O. Clark and Sherman Anderson, both of Los Angeles, for appellant.

Charles C. Stanley, R. K. Barrows, and E. S. Williams, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

By the terms of an oil lease dated February 26, 1927, defendant corporation, as lessee, agreed to pay plaintiff corporation, as lessor, one-fifth royalty for oil and gas produced on the latter's property. The lease also specifically provided that if gas produced on the premises "shall be sold by lessee, said lessee shall pay said lessor one-fifth of the amount * * * received therefor"; and also, that "in the event that said lessee shall have produced or caused to be produced and saved gasoline or other products from the gas taken from said premises, the lessor shall be entitled to one-fifth royalty of such gasoline or other products." Production under the lease commenced in May, 1927, and on January 27, 1933, plaintiff filed the within action for an accounting for royalties under the lease. No question is raised as to the payment for oil produced. The only controversy relates to the royalties upon

natural gas in so far as gasoline was manufactured from such gas.

Defendant delivered the "wet" gas from the property involved, as well as from numerous other leases, to an absorption plant owned and operated by General Petroleum Corporation, where the commingled total was treated for production of gasoline. Of the gasoline so produced apportionment was made to the various leases in proportion to their respective contributions to the total gas treated. Payment was made by General Petroleum Company to defendant herein under certain contracts, by which, in effect, defendant was to receive as the sale price of the natural gas delivered, 45 per cent. of the gasoline manufactured or produced from such gas. Although the contract between defendant and General Petroleum provided that defendant, at its option, might take its 45 per cent. royalty in kind, that is, 45 per cent. of the gasoline extracted from the "wet" gas, such option was never exercised, and throughout the period of production in controversy defendant received its payment in cash. Of the cash so received from General Petroleum for the gasoline so produced by it from plaintiff's leases, defendant made monthly remittances to plaintiff of one-fifth, transmitting with the remittances statements showing the number of gallons of gasoline credited to defendant by General Petroleum, the rate per gallon, the total credit, and the computation of "gasoline royalty-⅕," with the figures for the number of gallons and the computed cash amount of the remittance. After August, 1928, these statements also showed the meter readings of the total amount of gas delivered, the total amount of gasoline recovered and the notation "Royalty of ⅛ of 45% on gasoline recovered," with the appropriate computations in number of gallons and cash due plaintiff therefor.

Defendant's books were at all times open to plaintiff for inspection and no claim is made or can be made that plaintiff was not apprised at every stage of the transactions of the operations of defendant under its lease with plaintiff and of defendant's method of making its monthly settlements for gasoline recovered from the "wet" gas. Plaintiff's sole claim is that defendant in paying for the gasoline recovered from the "wet" gas should have paid, not one-fifth of the cash amount it received from General Petroleum, but the cash equivalent of one-fifth of the entire amount of gasoline manufactured by General Petroleum from the gas delivered by defendant from plaintiff's lease. In other words, by this action in accounting plaintiff seeks to recover upon the basis of one-fifth of all gasoline manufactured by General Petroleum from the gas produced from plaintiff's land, instead of upon the basis of one-fifth of 45 per cent. of such gasoline. Findings and judgment were in favor of defendant, and plaintiff appeals.

Appellant relies upon the theory that the natural gas from its lease was not sold by respondent to General Petroleum, but that respondent was itself, through the agency of General Petroleum as bailee, producing gasoline from the natural gas. By the terms of the lease, as noted above, for gas sold, appellant was to receive "one-fifth the amount received therefor," while for gasoline produced appellant became entitled to "one-fifth royalty of such gasoline or other products." Plainly, in our opinion, the contracts between respondent and General Petroleum constituted a sale and not a bailment of the gas delivered by respondent from appellant's lease. Particularly the contract of May 16, 1929, can be viewed only as a contract for the sale of gas. Words such as "purchase," "market," "sell and deliver," "agrees to pay," are used in the agreement, and these words commonly are employed to indicate an intention to pass title by sale. Furthermore, by the very plan of gasoline production there was a commingling of the gas from appellant's lease with gas from numerous other sources, so that whatever gas came from appellant's property lost its identity completely.

Courts in analogous situations involving an ore sampling mill (Chisholm v. Eagle Ore Sampling Co. [C.C.A.] 144 F. 670), a flour mill (Woodward v. Semans, 125 Ind. 330, 25 N.E. 444, 21 Am.St.Rep. 225), a grain elevator (Potter v. Mt. Vernon Roller Mill Co., 101 Mo.App. 581, 73 S.W. 1005), and like cases, have interpreted similar contracts as constituting sales and not bailments, and the distinction between the two is pointed out in the following language in the case of Scott Mining & Smelting Co. v. Shultz, 67 Kan. 605, 73 P. 903, 904: "If the identical thing delivered is to be returned, it is a bailment, and there is no transfer of title; but if the one to whom it is delivered may

return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a sale, and effect a change of title." Also, in Norton v. Woodruff, 2 N.Y. 153, the difference between the two classes of contracts is thus effectively defined: "The distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt."

[1] In the light of these definitive judicial expressions, we have no difficulty in determining that the contracts entered into by respondent with General Petroleum for the extraction of gasoline from the gas yielded by appellant's property constituted sales and not bailments of the gas. See, also, Martin v. Amis (Tex.Com.App.) 288 S.W. 431. This is further borne out by the fact that for all gas delivered and for all gasoline extracted, respondent was paid in cash and not in kind, although the amount of gasoline produced and the prevailing market price of such gasoline were used as measuring sticks to determine the cash payments. Thus whatever may have been the legal effect of the wording of the contracts, as an actual matter of fact and independently of any interpretation of their language which may now be made, there was in effect a sale of the gas and not a bailment. The entire course of dealing between respondent and General Petroleum was consistent only with a sale.

[2] Another consideration must determine this appeal in respondent's favor. In the monthly settlements between appellant and respondent, the latter submitted statements which, at least after August, 1928, disclosed upon their face the entire transaction between the parties, the basis of computation, the fact that respondent was paying royalty of one-fifth upon 45 per cent. of the gasoline recovered, and every other fact necessary to give appellant complete notice of all the details of the matter. Not only will appellant be presumed to have actual notice from these statements, but the testimony shows that appellant was in fact put upon notice; for upon February 8, 1929, it wrote to respondent making inquiry as to the reason for the payment of one-fifth of 45 per cent. instead of one-fifth of the total gasoline recovered. Respondent's prompt reply to that letter answered the inquiry by stating in effect that reliance was had upon the fact that the transaction with General Petroleum was a sale of the "wet" gas, and that payments of royalty to appellant were made upon the basis of cash received from such sale. The trial court was correct in its conclusion that the monthly settlements amounted to a series of accounts stated, and that by accepting payment without objection appellant assented to the correctness thereof and could not thereafter be heard to question the same. Hansen v. Fresno Jersey Farm Dairy Co., 220 Cal. 402, 31 P.(2d) 359.

[3] If doubt be entertained as to the form of the monthly statements prior to August, 1928, whether or not they constituted accounts stated, or if question be raised as to the interpretation of the letter contract in effect at that time, whether it amounted to a contract of sale or bailment, the points become immaterial because recovery for that period would in any event be barred by the statute of limitations, being for a period more than 4 years antedating the commencement of the within action.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 17

RATTERREE LAND CO. v. FOGLESONG et al.

Civ. 10818.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1936.

Rehearing Denied March 9, 1936.

Hearing Denied by Supreme Court April 16, 1936.

Vendor and purchaser ⇐317

In action to recover balance of purchase price of lot, whether vendor was guilty of fraud and misrepresentation or failed to perform conditions precedent to its right to demand performance by purchasers, and alleged failure of consideration, *held* for trial court sitting without jury.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by the Ratterree Land Company against Clara M. Foglesong and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Winterer & Ritchie, of Los Angeles, for appellants.

Walter Gould Lincoln, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff after a trial before a court without a jury.

September 1, 1926, defendants entered into a contract to purchase a lot from plaintiff for the sum of $5,000 payable $200 at the time of execution of the contract and the balance in stated installments. After paying certain installments pursuant to the terms of the contract, defendants declined to make further payments. Plaintiff commenced this action to recover the unpaid balance and interest due according to the terms of the agreement.

Defendants' amended answer alleged:

(a) Fraud and misrepresentation by plaintiff in procuring the contract.

(b) Failure of the plaintiff to perform conditions precedent to its right to demand performance by defendants.

(c) Failure of consideration for the contract.

Defendants also sought to recover the amount which they had paid to plaintiff upon the contract.

The trial court found in favor of plaintiff on all of the material allegations of the complaint and against defendants' alleged defenses.

The sole question presented for our determination is: Was there substantial evidence to sustain the findings of fact in favor of plaintiff and against defendants on the issues raised by the affirmative defenses?

An examination of the record discloses that there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact in favor of plaintiff and against defendants. We therefore refrain from further discussion of the evidence. Koberle v. Hotchkiss (Cal.App.) 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 532

BLAKE v. MOSHER.

Civ. 5497.

District Court of Appeal, Third District, California.

Jan. 30, 1936.

1. Appeal and error ⇐1010(1)

Evidence that negotiations for purchase of store business were not consummated by final "agreement" between parties *held* to require that judgment denying recovery of partial payment on purchase price be set aside.

In order that there may be an "agreement," parties must have a distinct intention common to both, and without doubt or difference. If any of proposed terms are not settled or no mode is agreed on by which they may be settled, there is no "agreement," although it is not necessary that all terms of contract be settled by single act.

[Ed. Note.—For other definitions of "Agreement," see Words & Phrases.]

2. Sales ⇐391(9)

Where negotiations for purchase of store business were not consummated and vendor, who had retained possession except for short time, had not been damaged by vendee's failure to complete purchase, vendor under doctrine of unjust enrichment was obligated to repay partial payment which had been made by vendee.

3. Money received ⇐1

Action for money had and received lies against any person who is in possession of funds which in equity and good conscience should be repaid.

Appeal from Superior Court, Yolo County; J. C. Bruton, Judge.

Action by Joseph Blake against Alexander Mosher. From a judgment for defendant, plaintiff appeals.

Reversed, with instructions to enter judgment for plaintiff.

Bradford, Cross & Prior, of Sacramento, for appellant.

Huston, Huston & Huston, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Action begun for money had and received. Defendant had judgment, and the plaintiff appeals.

The complaint in this action (omitting the title and the prayer) contains three paragraphs, as follows:

"I. That within two years last past, in the County of Yolo, State of California, defendant above named became indebted to plaintiff above named in the sum of Fifteen Hundred Dollars ($1,500.00) on account of moneys had and received by said defendant for the use, and for the benefit of said plaintiff.

"II. That plaintiff has demanded the payment of said Fifteen Hundred Dollars ($1,500.00) but defendant refused, and still refuses to pay same.

"III. That the sum of Fifteen Hundred Dollars ($1,500.00) is now due, owing and unpaid from defendant to plaintiff with interest thereon at the rate of 7 % per annum from the 15th day of November, 1934."

The answer contains only general denials.

At the termination of the trial the court made the following findings of fact:

1. That all of the allegations of paragraphs I and III of the complaint are untrue;

2. That all the allegations of paragraph II of the complaint are untrue.

Based upon the foregoing findings, the court drew its conclusion of law that the plaintiff was not entitled to recover, and the defendant was entitled to his costs.

The action in this case arose out of negotiations looking to a sale to the plaintiff of a store business at Clarksburg, owned and conducted by the defendant.

It would appear that some conference had been engaged in between Mrs. Lucinda M. Blake, acting as agent for the plaintiff, and the defendant Mosher, relative to the purchase and sale of the property just referred to. On October 29, 1934, it appears that Mrs. Blake paid to the defendant the sum of $1,500. At that time the following instruction in writing was executed:

"Oct. 29, 1934.

"Received of Mrs. L. M. Blake the sum of Fifteen Hundred
($1500.) A.M.
~~Eight Hundred Dollars ($800.)~~ L.M.B.
as part payment on my stock and equipment at Clarksburg.

"The total purchase price being four thousand dollars
dollars ($4000.).

"Payable, two thousand cash ($2000.) and two thousand dollars ($2000.) in a note well secured.

"Al Mosher."

The record contains absolutely no testimony concerning the meeting of the minds of the parties as to the terms and conditions of the proposed sale. It does appear, however, that on a certain day the plaintiff in this action and the defendant had a conference at which time they did not reach any terms as to the proposed sale, nor was there any agreement reached which would add to, or explain the terms of the writing dated October 29, 1934. At this conference the plaintiff called the deal off, and asked for the repayment of the $1,500. The repayment of this sum has not been made by the defendant, although frequent demand has been made therefor.

Respondent first raises the point that the action is not by the real party in interest. We do not need to set forth the testimony relating to this question, but it clearly appears therefrom that Joseph Blake, the plaintiff in this action, was the real principal, and that Mrs. Blake was simply acting as his agent. We may state, however, the court made no finding as to this question.

[1] In the argument of counsel both for the appellant and for the respondent attention has been called to the questions of rescission, abandonment, and unjust enrichment of the defendant. By reason of the fact that the testimony in this case, including the writing of October 29, 1934, shows that no valid contract was evo entered into between the plaintiff and th defendant relative to the sale and pur chase of the store belonging to the de fendant, it is unnecessary for us to de vote any time to questions of rescission an abandonment. While the writing dated

October 29, 1934, does acknowledge receipt of $1,500 and set forth the total purchase price as $4,000, and that $2,000 shall be paid in cash, it is absolutely blank as to the terms and conditions of the $2,000 to be evidenced by a note. There is nothing in the writing, nor is there anything in the testimony, indicating that the parties ever agreed as to the time of payment of the $2,000 to be evidenced by a note; nor is there anything in the testimony nor in the agreement itself, as to how the $2,000 note is to be "well secured"; whether it is to be secured by a mortgage on property owned by the plaintiff, or whether it is to be secured by the plaintiff obtaining the signatures thereto of persons considered financially responsible, does not appear; nor is there anything in the record, nor in the testimony, indicating who was to determine how the note should be secured, or who should determine whether the note was "well secured." There being no meeting of minds upon this essential question, no binding contract was ever entered into. A reading of the writing shows conclusively that neither one of the parties could maintain an action for specific performance by reason of the failure not only of the testimony, but of the writing, to contain essential terms.

In 13 C. J., p. 263, we find the following on the subject of mutual agreements: "In order that there may be an agreement, the parties must have a distinct intention common to both, and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement, although it is not necessary that all terms of a contract be settled by a single act, but the parties may settle one contract at a time, and the contract shall become complete when the last term is agreed upon."

In 6 Cal. Jur. p. 43, the rule as to consent or meeting of minds is thus stated: "There can be no contract unless the minds of the parties have met and mutually agreed. Consent is not mutual unless all parties agree upon the same thing in the same sense. The minds of contracting parties must draw together and become as one touching the subject matter and the terms and conditions, before the contract is consummated. * * * The rule that an agreement, to be binding as a contract, must embrace all the terms the parties intend to introduce, is general in California, whether the question arises in a suit for specific performance in an action to foreclose a mortgage, in an action to quiet title, or in an action for damages. Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. And where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been ad idem, and therefore, neither is bound." And further, in the same volume, section 142, dealing with contracts, the law is further stated in this language: "A contract sought to be enforced must at all events be so certain that its meaning can be ascertained. An indefinite contract cannot be enforced because the courts cannot know what the parties agreed upon."

[2] The record shows that after the conference to which we have referred, the defendant took possession of the store; in fact, that the plaintiff is shown to have been temporarily in possession only for a limited portion of one day. The defendant also testified that he had suffered no damage. The defendant not having suffered any damage, the principle of law relating to unjust enrichment applies, and the defendant was under obligations to repay the $1,500 to the plaintiff. First National Bank v. Matlock, 99 Okl. 150, 226 P. 328, 36 A.L.R. 1088; Blank v. Rodgers, 82 Cal.App. 35, 255 P. 235; Damerel v. North American B. & M. Co., 133 Cal.App. 290, 24 P.(2d) 237, 238.

[3] In the case of Blank v. Rodgers, supra, we find the following: "From the declarations of the complaint there is thus a showing of an unjust enrichment of the defendant at the expense of the plaintiff from which follows the legal conclusion that plaintiff is entitled to relief to the extent of the reasonable value of his improvements." (Citing a number of authorities.) The circumstances involved in that case related to improvements made by the plaintiff on property belonging to the defendant. The same principle would apply here to the $1,500 paid by the plaintiff to the defendant. That an action for money had and received is proper, see the case of Anderson v. Berger, 101 Cal.App. 728, 282 P. 416, 417. We quote from the opinion: "An action for money had and received

lies against any person who is in the possession of funds which in equity and good conscience he should pay to the plaintiff." (Citing authorities.)

It follows from what we have said that judgment in this case should have been entered in favor of the plaintiff; and to the end that further litigation and costs may be avoided.

It is hereby ordered that the findings of fact made by the trial court be set aside, and the following substituted therefor:

That all the allegations of the plaintiff's complaint are true and correct; that the conclusions of law drawn by the trial court be set aside and the following substituted therefor:

The court deduces the following conclusions of law from the foregoing findings of fact: That the plaintiff is entitled to judgment against the defendant, as prayed for in his complaint.

It is further ordered that upon the findings and conclusions of law so drawn, judgment be entered in favor of the plaintiff as prayed for in his complaint.

Judgment reversed with directions.

We concur: PULLEN, P. J.; THOMPSON, J.



11 Cal.App.2d 668

CARPENTER v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.

Civ. 1575.

District Court of Appeal, Fourth District, California.

Feb. 8, 1936.

1. Appeal and error ⇐839(1)

In action against vendor and its agent to rescind contract and to recover money paid on purchase price on ground of fraud and failure of consideration, judgment in favor of agent could not be questioned on appeal involving only failure of consideration, where agent was not party to contract and was not paid any of money sought to be recovered.

2. Vendor and purchaser ⇐119

Purchaser must rescind contract promptly after discovering facts entitling him to rescind.

3. Vendor and purchaser ⇐114

Purchaser who, after discovery of facts entitling him to rescind contract, conducts himself as though contract were valid, waives right to rescind.

4. Vendor and purchaser ⇐114

Evidence concerning conduct of purchaser of ocean lots, after he discovered that improvements which were part of consideration were destroyed by waves, *held* to support finding that purchaser waived right to rescind contract for partial failure of consideration.

5. Appeal and error ⇐1010(1)

Findings on questions of fact which are supported by competent and material evidence are conclusive.

6. Appeal and error ⇐994(3), 1012(1)

Question of weight and sufficiency of evidence and credibility of witnesses must be determined by trial judge.

7. Appeal and error ⇐110

Order denying motion for new trial is not appealable (Code Civ.Proc. § 963).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Charles B. Carpenter, also known as C. B. Carpenter, against the First Trust & Savings Bank of Pasadena and another. From the judgment and an order denying a new trial, the plaintiff appeals.

Judgment affirmed and appeal from order dismissed.

Charles D. Swanner, of Santa Ana, for appellant.

Porter & Sutton, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment in an action to cancel and rescind two contracts for the sale and purchase of real property, and to recover the money paid by plaintiff on account of the purchase prices. The complaint contains two causes of action, identical in form, each pertaining to a contract. In each count fraud and deceit, and partial failure of consideration, are alleged as grounds of recovery. The trial court found against plaintiff on all grounds. Apparently plaintiff has abandoned the question of fraud and deceit on appeal as it is not argued in his brief. Our examination of the record discloses

that the evidence on this question preponderates in favor of defendants. We will, therefore, confine ourselves to a consideration of the question of partial failure of consideration.

[1] William H. Burnham and others were trustors in a trust agreement wherein the First Trust & Savings Bank of Pasadena, which we will refer to as the bank, was trustee. The subject of the trust consisted of a number of lots at the easterly end of Balboa peninsula in the city of Newport Beach, in Orange county, title to which was vested in the bank. While the terms of the trust do not appear in the record we infer that it was a subdivision trust. Blankenhorn Realty Company was the exclusive agency through which the lots were sold. As the question of fraud and deceit was resolved in favor of defendants in the trial court and is not seriously argued on appeal, the correctness of the judgment in favor of Blankenhorn Realty Company cannot be questioned here as we have before us merely the matter of the partial failure of the consideration of a contract to which the agent was not a party nor was it paid the money which is sought to be recovered. We will treat the case as though the bank were the sole defendant. Ware v. Frank Meline Co. (Cal.App.) 53 P.(2d) 1033.

In May, 1923, the southerly, or ocean, side of the easterly end of the Balboa peninsula was a vacant sand spit with a rock breakwater extending from its easterly extremity westerly into the ocean. This breakwater had been constructed by public agencies. In that year this portion of the peninsula was subdivided into lots and blocks with the usual streets and alleys. This subdivided property became part, if not all, of the corpus of the trust estate, title to which was held by the bank.

In August, 1924, plaintiff became the purchaser of lot 1 in block D, and lot 19 in block E of this subdivision under two written conditional sales contracts in which the bank appeared as seller. The contracts were identical in terms, except as to prices, payments, and the respective descriptions of the lots. Both provided that the bank at its own cost and expense would cause to be constructed and installed the water mains, gas mains, conduits for electric wiring, alleys, cement sidewalks and curbs, and streets, together with a board walk along the ocean frontage of the properties. It is admitted that these improvements were all installed and paid for by the bank.

In the fall of 1924 the shore end of the breakwater began to sink and continued to do so during 1925 and 1926 to such an extent that the waves and tides broke over it, cross currents were set up and considerable portions of the two lots in question were washed away. All of the improvements constructed under the contract that served lot 1 in block D were washed out, and those serving lot 19 in block E were either washed away or rendered useless by being disconnected from the main system, excepting about sixty-five feet of the paving, curbing and sidewalk on the easterly side of the lot. It is admitted that the washing of the lots and the destruction of the improvements happened through no fault of either of the parties to the contracts.

During the summer of 1927 the city of Newport Beach caused the breakwater to be repaired and raised and a rock revetment to be extended for about three three hundred feet westerly along the water front. It passed about thirty feet oceanward from lot 19 in block E and protected it from overflow and further washing, but deflected the waves westerly along the beach so that lot 1 in block D was so washed that it was completely submerged. In the summer of 1930 the city of Newport Beach caused groins to be constructed at each end of, and at right angles to, the revetment. This broke up the waves and currents which had been washing away lot 1, block D, and the adjoining property. The city also dredged sand from the channel at the easterly end of the peninsula and caused it to be deposited along the ocean side of blocks D and E so that all the sand that had been washed away was replaced. The trial court found "that as a result of said work all said lots in Blocks 'D' and 'E' have been made higher, drier, better and safer than at the time said plaintiff and defendant bank entered into said agreement of purchase and sale."

The trial court found also that by reason of the surface of the lots being washed away "they were rendered temporarily unsuitable for residence purposes, and, by reason thereof, the consideration for said contracts failed in a material respect." Just what was in the mind of the trial judge in making this finding or what effect should be given to it does not clearly

appear, for in the previous finding he found that after the groins were constructed and the lots filled by the city they were "higher, drier, better and safer" than when the contracts were executed. The notice of rescission was not given by plaintiff until almost a year after the lots had been filled by the city.

The trial court further found "that in the latter part of November, 1927, after all the damage to said lots had been done, and after plaintiff had knowledge thereof, plaintiff wrote defendant bank as follows: 'I hope to be able to bring my contracts up to date about January 10th. Will that be O. K.? Yours truly, C. B. Carpenter,' and thereby elected to treat said contracts as in full force and effect, notwithstanding the damage theretofore done to said lots. That in September, 1929, said plaintiff paid $400 interest on said contracts, paying the interest thereon up to August 15, 1929, and thereby elected to treat said contracts as still in force." The trial court drew the following conclusions of law from the finding: "That plaintiff has waived the right to rescind the contracts Exhibits A and C annexed to his complaint, and each of them."

The notice of rescission was dated August 19, 1931, and the action was commenced on December 2, 1933. Plaintiff challenges the conclusion of the trial court that the cause of action was barred by the provisions of subdivision one of section 339 of the Code of Civil Procedure, as well as the conclusions of ratification of the contracts after partial failure of consideration had occurred, and waiver of the right to rescind after the right of rescission accrued.

It is admitted that the improvements which were damaged, washed out, or destroyed by the waves and tides, have not been reconstructed and that it will cost a considerable sum to replace them. We take it that this is the only partial failure of consideration that can be seriously urged and not the washing away of the surface of the lots which had been fully repaired about a year before the notice of rescission was given.

After all the damage had been done to the lots and the improvements, and after plaintiff had full knowledge of it, he made a substantial payment to the bank on July 21, 1927. In addition he wrote defendant in November, 1929, asking if it would be satisfactory for him to pay up his delinquent instalments at a later specified date. He also made a substantial payment in 1929. It is, therefore, evident that the challenged finding of ratification and waiver is supported by the evidence unless plaintiff had some valid legal excuse for his conduct.

[2, 3] The general rule concerning the waiver or loss of the right to rescind is stated in 25 Cal.Jur. 725, as follows: "A purchaser may waive or lose his right to rescind, whether it is given him by law or by express provision in his contract. * * * Whether a party has acted promptly depends upon the circumstances of the particular case, and is a question primarily for the trial court. A purchaser may rescind notwithstanding delay occasioned by negotiations with reference to the cancellation of the contract, or by promises on the part of the vendor to cure the defect complained of, but not where, after discovery of the facts justifying a rescission, he conducts himself as though the contract were still subsisting, as where he enters into new arrangements with the vendor, recognizes the validity of notes and mortgages given for the purchase money, or elects to pay the balance of the price and demands a deed."

In the case of Wilson v. Beazley, 186 Cal. 437, 199 P. 772, 774, the Supreme Court had before it the question of the waiver of the right to rescind for partial failure of consideration because part of the soil of the property in controversy was washed away by a flood. It was there said: "Assuming, for the purpose of discussion, and without deciding, that the alleged injuries to the land in suit caused by the floods constituted a cause for rescission, nevertheless the duty devolved upon the plaintiff to effect a rescission, if he were entitled to the same, with promptness. Civ.Code, § 1691, subd. 1. The failure to exercise reasonable diligence in this regard, after notice of the accrual of the right, will defeat the rescission. Ferguson v. Edgar, 178 Cal. 17, 171 P. 1061. A considerable interval of time ensued between plaintiff's first knowledge of the destruction caused by the flood and his attempted rescission. Moreover, plaintiff not only failed to promptly notify defendant that he declined to proceed with the purchase, but, in December, 1916, almost a year after the last flood, elected to tender the balance of the purchase price and demand a conveyance of the property at

that time. When plaintiff did serve a notice of rescission on December 2, 1916, it was based solely upon defendant's alleged refusal to accept plaintiff's tender and inability to furnish a clear title to the property. Having affirmed the contract after knowledge of the damage caused by the floods, plaintiff is precluded from claiming a failure of consideration or a right of rescission because of that damage."

In Evans v. Duke, 140 Cal. 22, 73 P. 732, the rule is laid down that a purchaser has but one election to rescind, which must be exercised promptly after discovery of the facts giving him that right; that if, after discovering the facts, he conducts himself as though the contract were valid and in full force, he waives all right of election to rescind, based on the known facts.

[4-6] To escape these well-established rules plaintiff urges that his actions did not constitute a waiver because during the entire time the "bank, or its agents, were urging plaintiff to make his payments and delay taking any action for rescission of said contracts, as it would see that the improvements were replaced upon the lots." The findings negative this contention.

This argument by plaintiff is supported by his testimony, which was flatly contradicted by witnesses for the bank. These witnesses testified that the only representations made to plaintiff on this subject were to the effect that efforts were being made to get the city of Newport Beach or another public agency to protect the lots from washing and replace the improvements; that no representations were made that the bank, the trustors, or any one else would replace the improvements. The trial court accepted the evidence of the bank's witnesses as true. The question was one of the weight and sufficiency of the evidence and the credibility of witnesses which must be determined by the trial judge. Cross v. Mayo, 167 Cal. 594, 140 P. 283. It was resolved by him adversely to the contention of plaintiff. We are controlled by the findings on questions of fact where they are supported by competent and material evidence.

As the findings which we have already considered are sufficient to support the judgment, it is unnecessary to review the other specifications of error.

[7] An order denying a motion for new trial is not appealable. Section 963, Code Civ.Proc.

The judgment is affirmed, and the appeal from the order is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.



11 Cal.App.2d 638

RODE v. ROBERTS.

Civ. 9929.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1936.

1. Automobiles ⇐244(20)

Evidence that motorist was tired and that she became angry when guest requested to be let out after automobile swerved toward telephone pole *held* insufficient to show that motorist was guilty of "willful misconduct" so as to authorize recovery for injuries sustained by guest in collision (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐242(1)

Presumption obtains that motorist did not act so as to cause injury to herself and occupants of automobile (Code Civ.Proc. § 1963).

Appeal from Superior Court, Contra Costa County; A. Caminetti, Jr., Judge.

Action by Geraldine Rode against Viola G. Roberts. From a judgment for the plaintiff, the defendant appeals.

Reversed.

James F. Hoey and Warren Cunningham, both of Martinez, for appellant.

Thomas M. Carlson and Robert Collins, both of Richmond, and Orlin J. Bell, of San Francisco, for respondent.

STURTEVANT, Justice.

While riding as the guest of her aunt, the defendant, in an automobile being driven by the latter, the plaintiff was injured

in an automobile accident. In her action to recover damages for the injuries so sustained the jury returned a verdict in her favor. From the judgment entered thereon the defendant has appealed.

The plaintiff's complaint was based on the provisions of section 141¾ of the California Vehicle Act (St.1923 p. 517, as added by St.1929, p. 1580), as amended by chapter 812 of the Statutes of 1931, p. 1693. The statute provides that in an action by a guest "the burden shall be upon plaintiff to establish that such intoxication or wilful misconduct was the proximate cause of such death or injury or damage." In the instant case there was no claim that the defendant was intoxicated. In presenting her appeal the defendant contends that there was no evidence of willful misconduct on her part. That is the sole question presented.

Both parties concede that the meaning of the words "wilful misconduct," as used in said statute, are fully defined in Meek v. Fowler et al. (Cal. Sup.) 45 P.(2d) 194. It therefore becomes necessary to ascertain the rights of the parties as measured by the doctrine stated in the Meek Case and the cases there cited.

For some time prior to July 13, 1934, the plaintiff had resided on Lyon street near the Presidio in San Francisco. A short time before that date she had been ill and confined in a hospital, but returned to her home on that date. Knowing of her convalescence, her aunt, the defendant, invited her to take a vacation at the aunt's home near Concord in the county of Contra Costa. On the morning of July 16, 1934, the defendant, her husband, and Catherine Beam, their granddaughter, arose about 4 a. m. and drove to San Francisco. Mr. Roberts went to his place of business. Mrs. Roberts and Catherine later went to the plaintiff's residence where the plaintiff entered the defendant's car and they started for Concord. The defendant was driving, the plaintiff sat to her right, and Catherine sat behind the plaintiff. The record discloses no fault in the driving of the defendant until the automobile reached a point one mile west of where the accident occurred. The defendant was an experienced driver and had recently driven to Crescent City and back being gone approximately two weeks. On the date of the accident she drove along the highway at a speed of approximately 25 or 30 miles an hour. When she reached a point about a mile and a quarter west of the Grant Miller pumping station on the highway leading from Orinda to Lafayette, the plaintiff testified that the defendant yawned and at about the same time she allowed the left front wheel of the car to travel along the northerly side of the division line. The plaintiff testified that noticing these things she asked the defendant if she wanted to stop and take a rest. The defendant replied that she was not tired and proceeded. The highway is 18 to 20 feet wide and on each side is a shoulder 2 to 3 feet wide. The record contains no evidence that the highway is filled in or that it rests on an embankment. While there was other traffic on the road, none is shown to have been in the immediate vicinity of where the accident occurred. No obstructions are mentioned excepting two telegraph poles, one on the right-hand side of the highway and one, further east, on the left-hand side. Each one stood approximately 1½ to 3 feet from the shoulder. The road is straight. It was formerly a concrete road, but before the accident it had been rough-surfaced with macadam. The accident occurred at about 3:30 p. m. on July 16, 1934. There is no evidence that the road was wet from any cause whatever. The evidence shows that there was no loose gravel on the road, but on the outside of the shoulder there was some loose gravel. The record discloses no turns. The plaintiff testified that within the mile zone which we have mentioned at different times the defendant's car was partly or wholly on the left-hand side of the highway. When at a point about a quarter of a mile west of the Grant Miller pumping station, the car passed over the shoulder on the right-hand side. The driver made a quick turn of the wheel and the car passed the first telegraph pole, but the rear right-hand fender scraped it. The car then swerved across the highway in a northeasterly direction at an "unrelented" speed and hit the second telegraph pole about 148 feet further east on the highway. That collision was of such force that both the defendant and the plaintiff were more or less injured. The plaintiff testified that just before the car swerved toward the first telegraph pole the following incident occurred: Plaintiff: "Let me get out, I don't want to be in an accident." Defendant: "I won't! I will drive this car as I please!" Catherine: "Oh!" Defendant: (half turning and boxing granddaughter) "Keep still!" In the meantime,

as all three of those witnesses testified, the defendant was vigorously turning the steering wheel. She said she was attempting to avoid any accident. She also testified that she put on the four-wheel brakes "* * * slowly, very little, because my instructions have always been in driving a car that becomes unmanageable, that if you throw your brakes on quickly and forcibly that you are apt to turn over, and for that reason I didn't throw my brakes on heavy for I didn't care to turn over." The defendant testified: "Before I hit the first pole, I felt that perhaps I was just a little bit off the highway, but I had struck a little rock. That is the way I felt. * * * The car became unmanageable and I was trying to keep it on the highway and I gave it a quick jerk, like this (indicating) to bring it back and it just seemed to catch at once and then it was out again. I just couldn't manage it." She saw the second pole, but she also saw a barbed-wire fence on her left, when as she testified, she was attempting to avoid injuring her passengers and herself. The traffic officer who appeared shortly after the accident was told by one of the occupants of the car that the steering apparatus was out of order and caused the accident. The next day he called at the garage where the car was and manipulated the steering wheel. On the trial he testified that it was in working order. There was no other evidence as to whether the steering apparatus was or was not out of order. There was no evidence that the brakes were or were not out of order.

[1, 2] On the trial it was the theory of the plaintiff that because defendant got up at 4 o'clock she had become tired and worn-out and had become drowsy. Conceding such to be the fact, if she drove the car while drowsy such fact might indicate negligence, but not willful misconduct. However, there was no direct evidence the plaintiff was asleep and the oral conversations and other acts immediately before hitting the first pole and down to the time that the car collided with the second pole show that the defendant was not drowsy. Driving on the wrong side of the highway was in no manner connected with the accident. That driving occurred some distance back and at that time no accident followed as a result. There is not a particle of evidence that defendant intentionally drove off the highway. When off the highway from any cause whatsoever there is no evidence that she did not immediately attempt in all proper ways to get back on the highway. Speaking in anger to, and becoming angry with the plaintiff, does not justify the inference that the defendant did an act with knowledge that it would probably lead to the injury of her invalid niece and to the injury of herself and her granddaughter. The presumption is otherwise. Code Civ.Proc. § 1963; Lennon v. Woodbury, 3 Cal.App. (2d) 595, 600, 40 P.(2d) 292. As the second pole was in clear view and assuming that the defendant had actual knowledge of the peril to be apprehended, there is no evidence of defendant's failure to act, coupled with a conscious failure to act to the end of averting injury. However, those are elements which have been held necessary in establishing willful misconduct. Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279.

It follows that the evidence does not support the verdict.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 481

KOEHLER v. PECKHAM.

KOEHLER et al. v. PECKHAM et al.

Civ. 10679, 10680.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1936.

Stipulations ⇐18(8)

Where stipulation was entered into, seven years after action was filed, that case could be set for trial any time after certain date, motion to dismiss *held* erroneously granted, since stipulation extended time for trying action beyond the statutory time of five years from date action was filed (Code Civ.Proc. § 583, as amended by St.1933, p. 853; § 1010).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Actions by Marie Bertha Koehler against George C. Peckham and George C. Peckham, trustee, and by Marie Koehler and another against Charles E. Peckham and others. From judgments of dismissal, the plaintiffs appeal, and the cases were consolidated for hearing on appeal.

Judgments reversed.

Charles H. Sherrick, of Los Angeles, for appellants.

Root, Bettin & Painter, of Los Angeles, for respondents.

GOULD, Justice pro tem.

These two cases, consolidated for hearing upon appeal, involve the sole question of the legal correctness of the ruling of the lower court in each case granting a motion to dismiss and entering a judgment of dismissal upon the ground that said actions had not been brought to trial within five years after answers filed. Inasmuch as precisely the same question is involved in each case, the only difference between the actions relating to the slight variation in dates when the various papers were filed, it will be sufficient to state the chronology of case No. 10679.

Complaint was filed in the superior court July 21, 1928; answer of defendants was filed May 9, 1930; action was set for trial on its merits for July 7, 1932, and on that date went off calendar; defendants filed notice of motion, dated November 22, 1932, to dismiss for failure to bring to trial within two years after answer filed, which motion went off calendar without hearing.

Thereafter, on August 7, 1935, more than five years after answer filed and seven years after action filed, plaintiff and defendants through their respective attorneys of record entered into the following written stipulation, filed August 15, 1935: "It is hereby stipulated that the above entitled case may be set for trial at any time on or after the 9th day of September, 1935. Counsel further request and stipulate that said cause be set on the same date as case No. 290-097, entitled Koehler v. Peckham, is set for, as practically the same parties are involved and the same counsel appear as herein. A similar stipulation to set for trial in said case is being filed as herein."

Thereafter the case was set for trial for September 12, 1935, but on August 28, 1935 counsel for defendants served and filed notice of intention to dismiss for failure to bring the case to trial within five years "after answer filed," which motion was granted and the judgment of dismissal entered from which plaintiff now appeals.

At the time the motion to dismiss was made, section 583 of the Code of Civil Procedure, as amended in 1933 (St.1933, p. 853), provided for dismissal "unless such action is brought to trial within five years after the plaintiff has filed his action." Respondents' motion in the lower court was made for failure to bring the case to trial within five years "after answer filed," the moving party using the language of section 583 as it existed prior to the 1933 amendment. Appellants urge that the judgment of dismissal, based as it was upon a motion predicated upon a ground nonexistent at the time the motion was made, cannot be sustained in any event, for the reason that notice of motion such as this must state the grounds upon which it will be made (section 1010, Code Civ.Proc.), and a ground for motion not set forth in the notice may be disregarded by the court. People v. Hawley, 119 Cal.App. 548, 6 P. (2d) 976.

But passing without deciding the point as to insufficiency of the motions to dismiss, we are of the opinion that the judgments must be reversed for another reason. Section 583 of the Code of Civil Procedure provides for dismissal within five years after the plaintiff has filed his action, "except where the parties have stipulated in writing that the time may be extended." The stipulation of August 15, 1935, quoted above, is a stipulation for extension of time within the meaning of the statute, and under authority of Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 P. 616, it was effective to deprive respondents of the relief sought by their motion to dismiss. The same citation is authority for the proposition that the court is not deprived of jurisdiction by the mere lapse of the five-year period, and the matter of going to trial remains subject to stipulation of the parties until an actual order of dismissal is made.

The judgments appealed from are reversed.

We concur: CRAIL, P. J.; WOOD, J.

11 Cal.App.2d 681

DAY v. METROPOLITAN LIFE INS. CO.

Civ. 10008.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1936.

Rehearing Denied March 12, 1936.

Hearing Denied by Supreme Court April 10, 1936.

1. Absentees ⇐5

Constitutional law ⇐70(3)

Reasonable time after person's disappearance for institution of statutory proceeding to appoint trustee of his estate is purely legislative question, on which courts will not substitute their opinions for that of Legislature, unless unconstitutionality of statute fixing time is so apparent on its face that no circumstances under which it might operate constitutionally can be assumed (Code Civ.Proc. § 1822 et seq.).

2. Constitutional law ⇐42

Question of unconstitutionality of statute, not unconstitutional on its face, can be raised only in case wherein its application is sought against party who may claim that he has been denied some of constitutional guaranties under circumstances of such case.

3. Limitation of actions ⇐5(1)

Statute will not be declared unconstitutional because time fixed thereby for commencement of action or assertion of right is unreasonable, but court will permit action to be brought within reasonable time.

4. Action ⇐63

Reasonable time for commencement of action or assertion of right is more or less fact question, for determination of which court may look to general circumstances and conditions arising out of particular case.

5. Action ⇐6

Complaint, alleging that plaintiff, in action for declaratory judgment determining his rights as trustee of missing person in latter's life insurance policies, had right to avail himself of option therein to continue them in force as nonparticipating paid-up insurance within three months after due date of any premium in default, *held* sufficient, though not alleging that any premiums were in default at time of demand for such continuance (Code Civ.Proc. § 1822 et seq.; Civ.Code, § 450).

6. Insurance ⇐366

Life insurance policies, requiring presentation thereof for surrender or indorsement within three months after due date of any premium in default in order to exercise option to take cash surrender value thereof or paid-up insurance, *held* not to require insured to wait until such default before exercising option (Civ.Code, § 450).

7. Appeal and error ⇐863

Question whether trustee of missing person had power to exercise options in latter's life insurance policies to take paid-up insurance, instead of cash surrender value, which would best serve needs of insured's family, if any, after default in payment of premium, cannot be raised on appeal from judgment declaring trustee's rights in policies (Code Civ.Proc. § 1822b; Civ.Code, § 450).

8. Pleading ⇐216(1)

Question whether trustee of missing person may exercise option in latter's life insurance policies to take paid-up insurance after default in payment of premium, instead of cash surrender value, which would best serve needs of insured's family, if any, cannot be raised on demurrer to complaint in suit for declaratory judgment determining trustee's rights under policies (Code Civ. Proc. § 1822b; Civ.Code, § 450).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by L. N. Day, trustee of the estate of Frank Baumgarteker, a missing person, against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. Eldred Boland and Knight, Boland & Riordan, all of San Francisco, for appellant.

Lobdell & Watt and Harold L. Watt, all of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief to determine his rights as trustee of a missing person in several policies of life insurance. Judgment went for plaintiff after defendant's demurrer to the complaint was overruled, and the defendant has appealed on the judgment roll.

On June 10, 1932, plaintiff was appointed trustee of the estate of Frank Baumgarteker, a missing person, under the provisions of sections 1822 et seq. of the Code of Civil Procedure. As a part of the estate plaintiff took possession of four life insurance policies issued by the defendant on the life of Baumgarteker. Each policy contained identical clauses in respect to options on surrender or lapse in accord with the nonforfeiture provisions of section 450 of the Civil Code. Acting upon these

terms of the policies, the plaintiff made written demand upon the defendant to have these policies continued in force as nonparticipating paid-up insurance. The defendant refused to comply with the demand, taking the position that plaintiff had no legal standing because the statute under which he was appointed trustee was unconstitutional. This was the principal ground urged in the demurrer and on this appeal, but defendant also argues that neither plaintiff nor the insured had the right to exercise any of the options provided for in the policies prior to an actual default, and that the complaint was insufficient because it did not allege an actual default when the demand was made. In a supplemental brief filed on this appeal, the defendant has raised the additional point that the trustee could not assert the right to exercise any of the options under the policies except the first, for the cash surrender value, because an immediate cash payment would be most advantageous to the beneficiaries under the policies. We will consider the points in this order:

[1-4] It may be conceded that, under certain circumstances, an absence of three months might be an unreasonable time to permit a proceeding under the statute. On the other hand, circumstances might arise which would justify a proceeding earlier than that. If a husband and father openly abandons his wife and children and openly declares his intention to disappear and leaves behind him sufficient property to support those dependent upon him but leaves it in a way that they cannot use it, no court would be justified in holding that they must wait seven years before the property could become available for their support. Yet a period of seven years is the minimum time which the appellant here concedes to be reasonable. If this court, on the record before us, should declare either that ninety days was too short or that seven years was too long, such determination would have no factual basis but would rest on conjecture alone. In the last analysis these questions are purely legislative, and the courts will not substitute their opinions for that of the Legislature unless the unconstitutionality of the statute is so apparent on the face that no circumstances can be assumed under which it might have a constitutional operation. By this we mean that, unless the statute on the face appears unconstitutional, that question can be raised only in a case where its application is sought against a party who may claim that, under the circumstances of that case, he has been denied some of the constitutional guaranties. 6 R.C.L. p. 89 et seq.; Ramish v. Hartwell, 126 Cal. 443, 451, 58 P. 920; Castillo v. McConnico, 168 U.S. 674, 680, 18 S.Ct. 229, 42 L.Ed. 622. This principle is illustrated in the numerous cases which have arisen relating to the application of statutes of limitation generally. If the time fixed by a statute within which an action may be commenced, or a right asserted, is an unreasonable time, the statute will not be declared unconstitutional or void for that reason, but the courts will permit the action to be brought within such time as may be found to be reasonable. 5 Cal.Jur. p. 755; Doehla v. Phillips, 151 Cal. 488, 491, 91 P. 330; Rhoda v. Alameda County, 134 Cal.App. 726, 735, 26 P.(2d) 691. The question as to what is a reasonable time for that purpose is more or less a question of fact, and, like the question of the reasonableness of police regulations, the courts may look to the general circumstances and conditions arising out of the particular case. Abbey Land & Improvement Co. v. County of San Mateo, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann.Cas.1915C, 804.

The record here discloses that Baumgarteker disappeared on November 25, 1929. He was then a resident of Los Angeles county, and left both real and personal property situated therein. It does not appear when the petition under the Code section was filed, but the trustee was appointed on June 10, 1932. The complaint in this action was filed on April 13, 1934, and alleged that his whereabouts had been unknown ever since his disappearance in 1929. It further appears that the insurance policies involved in this proceeding were a part of the personalty left by Baumgarteker, and that the premiums due were presumably long in default. The condition of the realty is not disclosed, but the need of a caretaker may be fairly assumed. All these circumstances might have been given consideration on the question of the reasonableness of time in which the proceeding was instituted, if that question had been properly raised. Thus, if the missing person had, in any appropriate proceeding, raised the question, and it should have there appeared that his property had merely been preserved for his benefit during his absence, it is not conceivable that he could have shown a denial of due process, a de-

nial of equal protection, or a denial of any of his constitutional privileges. If the real party in interest cannot assert a denial of any of these rights, it must follow that a third party is in no position to raise that question in a collateral proceeding.

[5, 6] The policies contained the provision that after the premiums for two full years had been paid, the insured should be entitled, upon written request and surrender of the policies within three months after the due date of any premium in default, to exercise one of three options: Cash surrender value, paid-up endowment insurance, or paid-up term insurance. The appellant contends that the complaint is insufficient because it does not allege that any of these premiums were in default at the time the demand was made. The point is unsound for two reasons: The action is one for declaratory relief; the complaint asked and the court adjudged that the respondent "has the right *to avail himself* of the (option) * * * within three months after the due date of any premium in default." In this respect the decree follows the terms of the policies and of the statute. If or when the premiums become in default the demand becomes effective for all purposes. Secondly, the policies do not require the insured to wait until the premiums are in default before he can exercise the option. The three months' period mentioned in the policies relates to the time of presentation of the policies for surrender or indorsement. But this period is merely a limit within which the policies must be returned for that purpose. There is nothing in the language which supports the claim that either the written request or the presentation of the policies may not be made before default, or made in contemplation of default to become effective when the default occurs. Joyce on Insurance, vol. 3, p. 2296, § 1184; Lovell v. St. Louis Mutual Life Ins. Co., 111 U.S. 264, 4 S.Ct. 390, 28 L.Ed. 423.

[7, 8] Lastly it is argued that the trustee can have no power to exercise any of the options except the first—to demand the cash surrender value of the policies—because perchance the insured might have left a wife and family whose needs would best be served by an immediate cash payment. This is not a question which can be raised on this appeal. The court in which the estate of the missing person is pending has the power under section 1822b of the Code Civ.Proc. to direct the trustee in the administration of the estate. Whatever the interests of the family, if any, may be is a question to be heard in that court. It is not a question which may be raised on a demurrer to the complaint for a determination of the rights of the trustee under the policies.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 707

SECURITY FIRST NAT. BANK OF LOS ANGELES v. DENTON et al.

Civ. 1767.

District Court of Appeal, Fourth District, California.

Feb. 13, 1936.

Appeal and error ⇐1161

Judgment would be reversed and cause remanded for further proceedings, as stipulated by all parties, where respondent confessed error, and errors pointed out appeared to justify reversal.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Security First National Bank of Los Angeles, a national banking corporation, as administrator of the estate of John W. Denton, deceased, against Mildred B. Denton, Maryland Casualty Company, New Amsterdam Casualty Company, and another. From the judgment, the Maryland Casualty Company and the New Amsterdam Casualty Company appeal.

Reversed and remanded.

John Ralph Wilson and McKinstry, Haber & Coombes, all of San Francisco, for appellants.

William C. Crossland, of Fresno, for respondent.

PER CURIAM.

The respondent herein has confessed error in the record, and all parties have stipulated that the judgment may be reversed, and the cause remanded for further pro-

ceedings, and that the remittitur be issued forthwith.

The errors pointed out appear to be material, prejudicial, and sufficient to justify a reversal.

The judgment is reversed, and the cause remanded for further proceedings, the remittitur to issue forthwith.

LOCKE v. MITCHELL et al. *

Civ. 9522.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1936.

Hearing Granted by Supreme Court March 20, 1936.

1. Libel and slander ⇐34

Section of statute defining privileged publication is not mere rule of pleading, but is part of substantive law of libel and vital to question as to whether cause of action exists (Civ.Code, § 47).

2. Libel and slander ⇐4, 51(1)

Under statute defining libel, malice is not the gist of the action, and cause of action may arise without existence of malice thereunder; but, where communication is shown to be privileged, malice becomes gist of the action and must exist as a fact before cause of action will lie (Civ.Code, §§ 45, 47, 48).

3. Libel and slander ⇐97

Where it appears from complaint that communication is privileged, question as to whether complaint alleges malice is proper subject for demurrer (Civ.Code, §§ 45, 47, 48).

4. Libel and slander ⇐51(1)

"Malice," within statute defining privileged publication, is malice in fact and not malice in law (Civ.Code, §§ 47, 48).

[Ed. Note.—For other definitions of "Malice," see Words & Phrases.]

5. Pleading ⇐8(4)

Complaint alleging that defendant officers of League of California Municipalities sent letter to officials of "Member Cities of League" reporting discharge of plaintiff as secretary-manager of league for misappropriation of league's funds, and that such charges in letter were false, malicious, and scandalous, *held* insufficient to state cause of action for libel, in absence of allegations of malice in fact; allegation that charges were malicious being mere conclusion (Civ. Code, §§ 47, 48).

6. Libel and slander ⇐101(1)

Plaintiff in libel action seeking award of punitive damages based upon malice has burden of proving existence of malice as state of mind and evil motive of defendant (Civ. Code, § 48).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by William J. Locke against James H. Mitchell and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Kirkbride, Wilson & Brooks, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellant.

Paul J. Otto, of Los Angeles, for respondent James H. Mitchell.

W. L. Pollard and S. L. Kurland, both of Los Angeles, for respondent Gordon Whitnall.

DORAN, Justice.

This is an action for libel.

The second amended complaint alleges that appellant was the secretary of the League of California Municipalities, an association composed of one hundred incorporated cities and towns in California; that he was discharged by the board of directors of the league without any valid reason; that James H. Mitchell, a member of said board of directors, voted in favor of the dismissal and discharge of appellant; that respondents maliciously composed, of and concerning appellant, false and defamatory matter in the form of a letter.

The letter which is set up in full in the complaint appears to be on the stationery of the League of California Municipalities, where also appears under the title of president, the name James H. Mitchell. It is dated San Francisco, and is addressed to "Honorable Mayors and City Officials of the Member Cities of the League of California Municipalities. Gentlemen:" and signed "James H. Mitchell, President, League of California Municipalities." To quote the letter in full would serve no purpose. It will be sufficient to refer to the

parts thereof about which appellant complains.

The letter begins as follows:

"Gentlemen:

"On Saturday and Sunday, March 12, and 13, 1932, the Board of Directors of the League of California Municipalities met in a regularly called meeting at San Francisco. At the conclusion of this meeting the Board was compelled in view of the facts presented to ask for the resignation of Mr. William J. Locke as Secretary-Manager, although a complete statement cannot be given until the report of Messrs. Skinner & Hammond, Certified Public Accountants, is filed.

"Some of the facts which caused this action are as follows:

"During the absence of Mr. Locke from the office of the League in June, 1931, Mr. Levy, Treasurer of the Municipal Publishing Company, publishers of Pacific Municipalities, came into possession of a check for $190.00, payable to the League of California Municipalities, which was issued by the Neptune Meter Company in payment of rent for exhibit space at the Monterey Convention. Mr. Locke authorized Mr. Levy by wire to endorse this check in the name of the League. This check was endorsed by Mr. Levy and cashed and the proceeds thereof used for purposes other than for the League. The League has never been reimbursed for the amount of this check even though the League was clearly entitled to at least sixty percent of the amount of this sum of $190.00.

"Subsequently, several other checks payable to the League were endorsed and cashed. At least the major portion of the proceeds thereof was used for other than League purposes. It was stated they were used by Municipal Publishing Company.

"The testimony given to the Board showed without contradiction that of the various sums appropriated as aforesaid, there is at least now a net sum of $202.40 unpaid. The Board acquired knowledge with regard to those transactions from sources other than the office of the Secretary-Manager."

The letter then refers to transactions between the league and the Municipal Publishing Company, of which appellant was, as the letter stated, acting as president, and that it was the unanimous opinion of the board that appellant's resignation should be requested. The next to the last paragraph of the letter is as follows:

"The Board sincerely regrets being compelled to take this drastic action, but feels it to be necessary from the standpoint of the best interest and welfare of the League, and sincerely believes no other course possible under the circumstances, even though these transactions may indicate nothing more than, as Mr. Locke has stated, merely a matter of bad judgment on his part."

It is alleged that the letter was intended to mean that appellant has misappropriated the sum of $190 and other sums, and that the letter was intended to and did create in the minds of numerous readers thereof and persons who heard it read, that appellant had wrongfully appropriated the sum of $190. It is further alleged "that the said charges made and published in said letter were and are false, malicious and scandalous, and did and do expose plaintiff to hatred, contempt and ridicule."

A demurrer to the second amended complaint was sustained with leave to amend. Later the order was modified to "without leave to amend" by nunc pro tunc order, and a judgment was entered dismissing the action. Evidently appellant elected to rely on the asserted sufficiency of the complaint, for the record does not show a request for leave to amend.

It is contended by appellant that the communication is not privileged and is libelous per se, and therefore that the complaint states a cause of action.

Respondent takes the position that the communication is privileged; that it is not libelous per se; and that therefore it is necessary for appellant to allege facts to show actual malice, in the absence of which under such a state of facts no action for libel would lie.

[1] If appellant has any cause of action at all, it is by virtue of the provisions of sections 45 and 47 of the Civil Code. Elementary in the extreme, such a statement seems absurdly unnecessary but for the fact that it serves as a basis for the further declaration that the provisions of section 47 are as much the substantive law of libel as the provisions of section 45; and it is the law as declared in section 47 that is particularly applicable to this appeal. In other words, section 47 is not a mere rule of pleading; its provisions are as vital to the question as to whether or

not a cause of action exists, as the provisions of section 45. These sections are as follows, so far as they apply to the case at bar:

"§ 45. *Libel, what.* Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

"§ 47. *Privileged publications.* A privileged publication is one made * * *

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

Section 48, which will be referred to later, is as follows:

"§ 48. *Malice not inferred.* In the cases provided for in subdivisions three, four, and five, of the preceding section, malice is not inferred from the communication or publication."

[2-4] Malice is never the gist of the action under section 45, and a cause of action may arise, without the existence of malice, under that section. Taylor v. Lewis, 132 Cal.App. 381, 22 P.(2d) 569. But when the communication is shown to be privileged as defined in subdivisions 3, 4, and 5 of section 47, malice becomes the gist of the action and must exist as a fact, before the cause of action will lie. Hence, if it appears from the complaint that the communication is privileged, the question as to whether or not the complaint alleges malice is a proper subject for demurrer. Gosewisch v. Doran, 161 Cal. 511, 119 P. 656, Ann.Cas.1913D, 442; Riley v. Evening Post Publishing Company, 30 Cal. App. 294, 158 P. 225. It was therefore incumbent upon the plaintiff and appellant in the action at bar to allege malice, in the absence of which allegation, the complaint would not state a cause of action. It is well settled that the malice referred to in this section is malice in fact and not malice in law. Snively v. Record Publishing Company, 185 Cal. 565, at page 576, 198 P. 1.

It should be noted, incidentally, that the case at bar is not to be confused with that class of cases, of which there are many, that require the allegation of malice to support a claim for punitive damages, but wherein the element of privilege is not involved. Such cases are not affected by the provisions of section 48, and the communication itself, especially if it is libelous per se, is often held to be sufficient to constitute the required allegation of malice. Gilman v. McClatchy, 111 Cal. 606, 44 P. 241. Neither should it be confused with those cases which, on the face of the complaint, do not show privilege, for in those cases privilege must be alleged in the answer to become available as a defense. Maher v. Devlin, 203 Cal. 270, 263 P. 812. Nor with those cases wherein the decisions deal with and discuss the character and sufficiency of the evidence, but make no reference to doctrines affecting the adequacy of the pleadings.

[5, 6] The complaint in the case at bar cannot be held to adequately allege malice in fact. No facts are alleged as a basis for the claim that malice existed at the time the communication was published. The allegation that "said charges made and published in said letter * * * were and are false, malicious and scandalous," is obviously a mere conclusion, hence the contention of respondent that the complaint does not state a cause of action must be upheld. Taylor v. Lewis, supra. Moreover, there is a plea for punitive damages, and in Davis v. Hearst, 160 Cal. 143, at page 166, 116 P. 530, 540, the court declares: "It follows necessarily from the foregoing that, since malice in fact goes to the state of mind and evil motive of the defendant, the burden of proving the existence of that state of mind is, in every case, upon the plaintiff who seeks an award of punitive damages based upon its existence."

In the light of the foregoing, the question as to whether or not the article complained of is libelous per se, is unimportant. Even though it were libelous per se, although there appears to be no reason for such an assumption, it could not serve as a substitute for the necessity of alleging malice in fact, for under the provisions of section 48, "malice is not inferred from the communication or publication" when such communication is of the class described in subdivision 3 of section 47.

Appellant emphasizes the authority of Stevens v. Snow, 191 Cal. 58, 214 P. 968, 970. In that case the complaint on its face showed that the publication was unprivileged and the decision properly points out that under such circumstances the defense of privilege, to be availed of, must be pleaded in the answer. The same decision contains the rule respecting the pleadings, where it declares that: "The rule that privilege, to be available as a defense, must be pleaded, is subject to the single exception that when it appears upon the face of the complaint it may be availed of by demurrer." The next sentence, however, might cause some confusion were it not for the fact that it is obiter dictum. It is as follows: "But this exception is limited to cases of absolute privilege under subdivisions 1 and 2 of section 47, Civil Code, and manifestly this must be so, because of the fact that in cases of qualified privilege the burden is upon the defendant to prove the absence of malice." It should be noted that the last quotation is unsupported by authority, and left suspended in the opinion, as it is, without qualification, it is likely to leave the impression that it is intended as a departure from the settled weight of authority.

In the Snow Case the communication is both libelous per se and unprivileged, and the defendant having failed to raise the issue in the answer was properly foreclosed in the proof. No reason is given for the assertion that, "this exception is limited to cases of absolute privilege," except the statement that, "manifestly this must be so, because of the fact that in cases of qualified privilege the burden is upon the defendant to prove the absence of malice." Unless dictum, it must be held to refer specifically to the Snow Case.

Both sections 45 and 47 are clear, definite, and unambiguous, and there is nothing in either section to indicate that any part thereof is either the rule or the exception. To hold otherwise would permit the mere tentative allegation of a communication as the basis of an action for libel, and impose upon the defendant the burden of perfecting the cause of action in the answer; a doctrine that could claim, as its only virtue, a tendence to speculate in litigation.

Newell on Slander and Libel, third edition, states the rule as follows: "In all cases of defamation the plea of the general issue puts the plaintiff upon proof of every material allegation of his declaration * * * 4. The malicious intent where malice in fact is material" (page 788), and further the same author at page 936 declares the rule to be, "It is for the court to decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. * * * *If, however, the privilege was only qualified, the burden is on the plaintiff of proving actual malice.*"

For the reasons given the complaint failed to state a cause of action and the demurrer was properly sustained.

Judgment affirmed.

YORK, Justice.

I concur.

HOUSER, Presiding Justice.

I concur in the judgment.



11 Cal.App.2d 609

PEOPLE v. RUCKER.

Cr. 2800.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1936.

Hearing Denied by Supreme Court Feb. 5, 1936.

1. Homicide ⇐270

Sanity of accused at time he committed murder *held* for jury.

2. Criminal law ⇐1159(3)

Finding of jury based upon conflict in proof could not be disturbed on appeal.

3. Criminal law ⇐1036(6), 1137(5)

Opinion evidence given by psychiatrists concerning ability of accused to distinguish between right and wrong which was objected to on appeal as invading province of jury *held* not reversible error, where no objection was made in lower court, and witnesses for accused expressed similar opinions.

4. Criminal law ⇐525

Evidence tending to establish that accused was not in full possession of his faculties at time he confessed having committed murder did not render confession inadmissible, but was evidence to be considered by jury in determining weight to be given confession.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Homicide ⇐309(5)

Instruction that jury could only find accused guilty of murder and refusal of instruction on manslaughter *held* proper, where accused was either guilty of murder or was insane at time of shooting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Edgar H. Rucker was convicted of murder, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

WHITE, Justice pro tem.

This is an appeal from a judgment after conviction of the crime of murder, and from the order denying appellant's motion for a new trial.

To the charge of murdering one Jennie Curley, appellant interposed his pleas of not guilty and not guilty by reason of insanity. By the verdict of the jury appellant was found guilty of murder in the first degree, with a penalty of life imprisonment, and by the same jury was pronounced sane at the time of the commission of the offense.

The evidence without conflict shows that on the night of January 18, 1932, appellant shot and killed Jennie Curley. It appears that appellant and deceased had at one time lived together in the same house for a period of about two years. Four or five months before the homicide they separated; that after such separation appellant sought to induce deceased to return to him; that on at least two occasions appellant threatened the woman with a gun, and some two days before the killing, when appellant unsuccessfully sought her permission to return to her, he drew a gun and stated he would kill her rather than have any other man live with her. Also, appellant, a few days before the shooting, on two separate occasions stated to people that he would kill the deceased some day.

[1, 2] Appellant earnestly contends that the judgment should be reversed for the reason that the evidence introduced at the trial established the fact that appellant was insane at the time he committed the crime. It is true, as claimed by appellant, that some four psychiatrists and several lay witnesses testified that in their opinion appellant was insane, but it is also true that the record discloses substantial expert and nonexpert evidence of appellant's sanity. It would serve no useful purpose to state in detail the testimony given on this issue, because it would only result in showing that there was a conflict in the proof. Under such evidence it was clearly a question of fact for the jury to determine whether at the time of the homicide appellant was sane; and the findings of the jury thereon will not be disturbed in this court. People v. Ure, 68 Cal.App. 545, 229 P. 987; People v. Schuler, 87 Cal.App. 68, 261 P. 1059; People v. Niino, 183 Cal. 126, 190 P. 626; People v. Loomis, 170 Cal. 347, 149 P. 581; People v. Troche, 206 Cal. 35, 50, 273 P. 767.

[3] In his reply brief appellant directs our attention to the fact that since the filing of his opening brief, this court, in People v. Jacobs, 51 P.(2d) 128, has held it to be error to permit psychiatrists to express an opinion concerning the ability of a defendant to distinguish right from wrong, upon the ground that such expression of opinion invades the province of the jury. In the Jacobs Case, a hearing has been granted by the Supreme Court, and the matter is now pending therein. For that reason, the law stated therein may not be accepted as final. However, in the instant case, while it is true that such opinion evidence was given, yet no objection was urged against it in the lower court, nor was any appropriate motion to strike made. In fact, witnesses called by and testifying for appellant at the trial expressed similar opinions. Objection cannot therefore be made for the first time in this court, especially in view of the fact that kindred testimony was produced by appellant himself.

[4] On the first or general issue of not guilty, the issue of legal competency was brought into the case by the defendant through his objection to the introduction in evidence of a confession which he had made to the police officers the day following the homicide, on the ground that he was mentally deficient and that he did not and could not have comprehended the significance of the statements and admissions which he was supposed to have made. On the issue of mental deficiency, the defend-

ant was permitted to and did introduce such evidence as he chose to present. The proper foundation was laid as to the free and voluntary making of the confession, and the court fully instructed the jury as to their power to disregard the confession if they found it to be made by a person mentally incompetent. Moreover, any evidence tending to establish that the defendant was not in full possession of his faculties at the time he confessed his guilt would not affect the admissibility in evidence of the confession itself, but would be evidence to be considered by the jury in determining the weight or effect to be given to it. People v. Lehew, 209 Cal. 336, 342, 287 P. 337; People v. Miller, 135 Cal. 69, 71, 72, 67 P. 12; People v. Cokahnour, 120 Cal. 253, 254, 52 P. 505; People v. Elder, 55 Cal.App. 644, 648, 204 P. 29. As indicated above, the jury was admonished and correctly instructed that it was for them to ultimately determine whether the confession was freely and voluntarily made. People v. Goold, 215 Cal. 763, 765, 12 P. (2d) 958.

[5] It is next contended that the court below committed reversible error in directing the jury that they could only find the defendant guilty of murder, and in refusing to instruct the jury that they could find the defendant guilty of manslaughter. In giving the instruction as stated, and in refusing defendant's requested instruction on manslaughter, the court did not err. Upon the evidence produced before the court, there remained no doubt that the crime committed was the crime of murder, and there was no evidence to the contrary. The only real question, therefore, was the question of the degree of murder.

"In a criminal case instructions are always to be given with reference to the facts proved before the jury. Accordingly, it is the established rule that on the trial of a person charged with murder it is proper to refuse to give an instruction as to a lesser degree than that of murder in the first degree, or as to a lesser offense included within the crime charged, if the evidence is of such a nature as to warrant only a verdict of first degree murder, in the event that the accused is guilty at all." People v. Watts, 198 Cal. 776, 793, 247 P. 884, 890; People v. Dye, 130 Cal.App. 522, 523, 525, 20 P.(2d) 358. The evidence in this case clearly showed that appellant was either guilty of murder, or he was insane at the time of the shooting.

The conviction of appellant is next assailed on the ground that the court erred in the giving and refusal to give certain instructions, but this claim is without merit, for the reason that a review of the instructions proffered to the court and those given to the jury clearly indicates that the court fairly, fully, and clearly instructed the jury upon all the issues raised by the evidence.

Being of the opinion that appellant was fairly tried and justly convicted, the judgment and order appealed from are affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 540

GOODALL et al. v. BRITE et al.

Civ. 1761.

District Court of Appeal, Fourth District, California.

Jan. 30, 1936.

Hearing Denied by Supreme Court March 30, 1936.

1. Counties ⇐153½

Counties cannot make gifts of public funds and cannot use public funds for private purposes (Const. art. 4, § 31).

2. Hospitals ⇐3

Power of board of supervisors of county hospital to adopt regulations for operation of hospital must be exercised within limits of board's constitutional powers (Pol.Code, § 4223).

3. Counties ⇐21½

County has power to promote public health and general welfare of its citizens (Const. art. 11, § 11).

4. Hospitals ⇐5

Admission and treatment of patients in county hospital who, either themselves or through legally responsible relatives, can provide themselves with equally efficient care and treatment in private institutions is unauthorized, since it does not promote health and general welfare of citizens of county and is not proper exercise of county's police power and results in use of public money for private purposes (Pol.Code, § 4223; Const. art. 4, § 31; art. 11, § 11).

5. Hospitals ⇐2

Providing hospital facilities to those legally entitled thereto is proper exercise of

police power of county, as public health and general welfare of county's citizens is thereby promoted (Pol.Code, § 4223; Const. art. 11, § 11).

6. Evidence ⇨15

It is common knowledge that considerable proportion of body of citizenship of any county is composed of deserving needy who have not been reduced to status of pauper.

7. Hospitals ⇨5

Patient in need of hospitalization, who cannot himself, or through legally liable relatives, pay charges of private institution, should be admitted to county hospital on ground that his care promotes public health and general welfare of county (Pol.Code, § 4223; Const. art. 11, § 11).

8. Hospitals ⇨5

Word "indigent," when used in connection with admissions to county hospitals, includes inhabitant of county who possesses required qualifications of residence, and who has insufficient means to pay for his maintenance in private hospital after providing for those who legally claim his support (Pol.Code, § 4223).

[Ed. Note.—For other definitions of "Indigent," see Words & Phrases.]

9. Hospitals ⇨5

Under statute providing for management of county hospitals, board can adopt rules for admission of patients entitled by law to enter, and can provide for care of patients not financially able to secure hospitalization in private institutions, at price determined by cost of hospitalization of each individual patient and ability of patient to pay (Pol. Code, § 4223).

10. Counties ⇨154½

In administration of public funds, county supervisors act as trustees, and should so administer funds as to lighten taxpayers' burden as much as possible.

11. Hospitals ⇨5

Persons injured or rendered suddenly ill in public disasters, and persons who are injured in accidents or become suddenly ill, should be admitted to county hospitals without immediate investigation of their financial conditions, and should be required to pay according to their abilities after investigation of their resources (Pol.Code, § 4223).

Appeal from Superior Court, Kern County; K. Van Zante, Judge.

Action by O. P. Goodall and others against Perry Brite and others, individually and as members of the Board of Supervisors of Kern County, and another. From the judgment, the defendants appeal.

Judgment affirmed, as modified.

See, also, 1 Cal.(2d) 583, 36 P.(2d) 190.

Thomas Scott, Dist. Atty., W. A. McGinn, Asst. Dist. Atty., and Borton & Petrini, Sp. Counsel, all of Bakersfield for appellants.

Nutter & Rutherford and Stephen Dietrich, all of Stockton, amici curiæ for appellants.

Siemon, Claflin & Maas, of Bakersfield, Hartley F. Peart, of San Francisco, and Finlayson, Bennett & Morrow, of Los Angeles, for respondents.

Elvon Musick, Howard Burrell, and E. Perry Churchill, all of Los Angeles, amici curiæ for respondents.

MARKS, Justice.

The plaintiffs are citizens and taxpayers of the county of Kern. The individual defendants are the members of the board of supervisors of the county.

Kern county maintains a hospital for the hospitalization of the sick and injured as well as for the care of the indigent poor and indigent aged of the county. The hospital is a well-equipped institution. With the tacit, if not the express, consent of the supervisors it is the practice to admit as patients persons well able to pay for hospitalization in private institutions, either themselves or through relatives legally liable for their support, and, also, persons who can pay only part of the cost of their hospitalization in the county institution and who obviously cannot pay the higher costs of private hospitalization. The plaintiffs challenged the right of defendants to use county funds to provide hospital care for these two classes of patients except in certain instances where such practice is permitted by statute.

It is freely conceded by counsel for defendants that they have provided hospitalization in the county hospital for these two classes of patients and that they will continue to do so if not enjoined by order of court. It is also admitted that in the past both these classes of patients have been asked to make "donations" towards the cost of their hospitalization; that no charges have been made against them and that no effort has been made to collect from any of them where the donations had not been made. It is also apparent from the evi-

dence that some citizens of Kern county who were financially able to pay for hospitalization and treatment in private institutions had been hospitalized for considerable periods of time in the county hospital without making any payments therefor. The trial court, on ample evidence, found there were sufficient private hospitals in Kern county to satisfactorily care for all cases hospitalized in the county hospital where the patients, or relatives legally liable for their support, could have paid for private hospitalization. Therefore, we do not have presented here any question of the right of a county hospital to receive a patient possessing substantial means where there was no other hospital within a reasonable distance which could afford him proper care and treatment.

Boards of supervisors are given the express power to establish and maintain county hospitals and to provide rules for their government and management. Section 4223, Pol.Code. A like power is given them to establish and maintain almshouses and county farms. Section 4224, Pol.Code. In Kern county the poor are cared for at the county hospital. Therefore, it is a combination county hospital and almshouse.

Defendants maintain that as the board of supervisors of Kern county is given the power to "establish" and "maintain" a county hospital and provide rules for its "government" and "management" the question of who shall be admitted and upon what terms is within the sound discretion of the board and cannot be controlled by injunction. They also urge that section 11 of article 11 of the Constitution vests in counties police powers which are as broad as those possessed by the state, except where prohibited by statute. From this they argue that as the promotion of the health of the residents of Kern county, as well as the promotion of their general welfare, is one of the principal police powers given under this section, they may admit to the hospital any resident of Kern county possessing the necessary qualifications of residence regardless of his ability to pay and without making any charge against him.

We will first consider these questions from the point of view of the admission to the hospital of those patients who either themselves, or through legally liable relatives, are able to secure and pay for hospitalization and treatment in private institutions.

Section 31 of article 4 of the Constitution "took from the Legislature the power to give, lend, or authorize the giving or lending of the state's credit, or that of any county, city, and county, city, or township, or other political corporation or subdivision of the state, in aid of or to any person, association, or corporation, municipal or otherwise, or to pledge the credit thereof in any manner whatever, for the payment of the liabilities of any individual, association, municipal, or other corporation whatever, or to make or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation whatever.

"These limitations divested the Legislature of all power to make appropriations of money to any private or quasi public corporation, or to make any gift to any municipal or public corporation not under the exclusive control and management of the state. It also deprived the Legislature of the power to authorize counties to make donations, or gifts or pledges of credit to such associations. The Constitution does not give to any department of the state government any power whatever to engage in private business or enterprise or to manage and control private corporations or quasi public corporations for private profit, although such corporations may be carrying on enterprises or performing functions which are for general public benefit and which tend to promote the general welfare. Our state government has no such powers." People v. San Joaquin Valley, etc., Ass'n, 151 Cal. 797, 91 P. 740, 742.

[1] It has been held that this same section of the Constitution prohibits cities and counties from making any gifts of public funds and of using public funds for private purposes. Pacific Mutual Life Ins. Co. v. County of San Diego, 112 Cal. 314, 41 P. 423, 44 P. 571; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433; Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035. The Legislature cannot authorize the use of county funds for any such purposes. Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am. St.Rep. 17; Conlin v. Board of Supervisors, 114 Cal. 404, 46 P. 279, 33 L.R.A. 752; Johnston v. County of Sacramento, 137 Cal. 204, 69 P. 962.

[2] It must be conceded that while the board of supervisors has the general power to adopt rules and regulations for the operation of the Kern county hospital, that

power must be exercised within the limits of their constitutional powers. It must be further conceded that if their acceptance for hospitalization of patients who, themselves, or through legally liable relatives can provide efficient hospitalization elsewhere amounts to a gift of public funds to private persons which is prohibited by section 31 of article 4 of the Constitution, its continuance may be enjoined by the courts.

In discussing the extent of the grant of police powers to municipalities by section 11 of article 4 of the Constitution the Supreme Court in the case of Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 383, 38 A.L.R. 1479, said: "The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927; District of Columbia v. Brooke, 214 U.S. 138, 149, 29 S.Ct. 560, 53 L.Ed. 941; [see, also, Rose's U.S.Notes]. It is not, however, illimitable and the marking and measuring of the extent of its exercise and application is determined by a consideration of the question of whether or not any invocation of that power, in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals (Hannibal, etc., R. R. Co. v. Husen, 95 U.S. 465, 470, 471, 24 L.Ed. 527; Boston Beer Co. v. Massachusetts, 97 U.S. 25, 24 L.Ed. 989), or general welfare of the people of a community (Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 592, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175 [see, also, Rose's U.S.Notes]). * * *

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.' Chicago, B. & Q. R. Co. v. Illinois, supra. Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.' (Streich v. Board of Education, supra [34 S.D. 169, 147 N.W. 779, L.R.A.1915A, 632, Ann.Cas.1917A, 760]), and that power 'may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' (Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.(N.S.) 1062, Ann.Cas. 1912A, 487 [see, also, Rose's U.S.Notes])." See, also, Coelho v. Truckell (Cal.App.) 48 P.(2d) 697.

In Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 227, 48 A.L.R. 509, it is said: "The selection of the hospital site was a matter within the legislative discretion of the board of directors of the city, and, unless in the exercise of that discretion the board acted arbitrarily and unreasonably, their action ought not to be enjoined.

" 'The location, establishment, and maintenance of such an institution is clearly within the scope of the police power of the city. General police authority to protect the public health is conferred upon the city by section 11 of article 11 of the state Constitution, which provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." ' "

[3] It follows as an inescapable conclusion from what has been said in the cases from which we have quoted that the promotion of the public health and general welfare of the citizens of Kern county falls within the powers granted to the county by section 11 of article 11 of the Constitution. Does the hospitalization in the county hospital of those able to secure efficient hospitalization in other institutions promote the health and general welfare of the citizens of Kern county? The answer to this question will determine whether that policy falls within the protection of the provisions of section 11, and also whether the expenditure of public funds for that purpose

amounts to a use of them for a public purpose or gifts to private persons. This last follows, because, if the use of the money for the purposes specified promotes the health or general welfare of the people of Kern county, that in itself should be held to be expenditures for a public purpose and not gifts to private persons.

[4] In approaching this question, it should be borne in mind that the record establishes the fact that there are excellent privately owned hospitals in Kern county with sufficient facilities to care for those who can pay for their care and treatment. It seems, therefore, that the question is not so much the preservation of the health and general welfare of the financially able citizens of the county as it is one of the preservation of their private resources. If a patient can be given the same and equally efficient care and treatment in a private hospital that he can receive in the county institution, his choice of a hospital does not determine his chances of recovery, but merely the amount he must pay to be healed, and whether he will pay the established charge of a private institution, or nothing, or the small donation hoped for by the county hospital. The preservation of the health and general welfare of the citizens of the county is a question of the prevention and cure of disease generally, and not the accomplishment of these ends by any particular means or in any particular institution. We therefore conclude that the admission and treatment of patients in the county hospital who, either themselves or through legally responsible relatives, can provide themselves with equally efficient care and treatment in private institutions does not promote the health and general welfare of the citizens of Kern county and is not a proper exercise of the police power of that county and results in the use of public money for private purposes.

We have further facts in the record bearing upon the question of the use of public money for private purposes. The defendants estimated the cost of hospitalization in the county hospital at $3 per day per patient. In arriving at this figure, no account was taken of a capital investment of several hundred thousand dollars, nor of depreciation. The amount of daily cost was reached by taking the total number at the hospital, which included the dependent aged, as the divisor, and the total spent for the operation of the hospital as the dividend, and dividing the result thus obtained by the number of days in the year. It is obvious that the daily cost of caring for an aged poor person who does not require hospitalization would not be as great as that of a strictly hospital patient. It is also obvious that the average daily cost of care and treatment of a patient hospitalized for a simple illness would not be as great as that of a serious operative case. The method used in reaching the daily cost per patient was so inaccurate and unbusinesslike that the result could not reflect the true daily cost to the county of any one patient. This must have resulted in gifts of county money to at least those patients who paid nothing and to those who paid only $3 per day and who were serious operative cases.

[5-7] When we approach the question of those patients who are admitted to the county hospital and who cannot pay for hospitalization in private institutions but who can pay something towards their care and treatment, we have an entirely different situation from the one we have been considering. We must bear in mind that providing hospital facilities to those legally entitled thereto is a proper exercise of the police power of the county (Jardine v. City of Pasadena, supra), as it tends to promote the public health and general welfare of the citizens of the county. Miller v. Board of Public Works, supra. In the second phase of the case we have the problem of the care of the health and the promotion of the general welfare of what we may term the deserving needy, but not the pauper class of the county. This class must be hospitalized at the county hospital or permitted to suffer without proper care. It is common knowledge that this class composes a considerable proportion of the body of the citizenship of any county. As a rule those composing it are honest, industrious, and often thrifty people whose welfare should be of first concern to any governmental agency. It is admitted that a resident pauper must be hospitalized at public expense. This is a matter of pure humanity and no one, solely because of poverty, should be permitted to suffer because of lack of funds. The same reasons apply with greater force to the class we are considering. We can visualize the head of a family who has employment and can keep it—an honest worker, frugal and thrifty, who supports his family, educates his children and has perhaps acquired an equity in a modest home. If he is injured, not in the course of his employment, the family income stops and he may require hospitalization and may

lack the funds with which to enter a private institution. Must it be said that he should be refused admission to the county hospital because he is not a pauper when if he were a pauper he would be admitted without question? This would amount to the penalizing of honest industry, thrift, and independence and would place a premium on indolence and shiftlessness. Under the principles of humanitarianism, and in the interest of a sound policy, we are compelled to hold that a patient in need of hospitalization, who cannot himself, or through legally liable relatives, pay the charges of a private institution, should be admitted to the county hospital because the care of such sick or injured promotes the public health and general welfare of the community in which he lives.

[8] If it were necessary we could find another satisfactory reason for the admission of this class of patients to the county hospital. It is admitted that indigent persons are to be admitted when in need of hospitalization. As far as we know, the term "indigent" has not been defined in California in so far as its use in connection with admissions to county hospitals is concerned. It has been defined in other states chiefly in connection with the admission of the indigent insane to hospitals. The term when thus used has been held to include persons with insufficient means to pay for hospitalization after providing for those who legally claim their support. Depue v. District of Columbia, 45 App.D.C. 54, Ann. Cas.1917E, 414; In re Hybart, 119 N.C. 359, 25 S.E. 963; Massachusetts Gen. Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N.E. 21; People v. Board of Supervisors, 121 N.Y. 345, 24 N.E. 830. Applying this definition to the instant case, we hold that the word "indigent," when used in connection with admissions to county hospitals, includes an inhabitant of a county who possesses the required qualifications of residence, and who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support.

Under the maxim, "Expressio unis est exclusio alterius" it is urged that as the Legislature has provided that certain classes of patients in the county hospitals may pay for their care, the members of no other class who can contribute to their care can be admitted, and, further, that as it is provided that those belonging to certain classes shall be admitted, no others can be received.

[9, 10] We cannot agree with this argument. Boards of supervisors are given broad powers in providing for the establishment and maintenance of county hospitals and in prescribing rules for their government and management. Section 4223, Pol.Code. The word "management" has been frequently defined when used in legal phraseology. When used in a statute giving the husband management and control over his wife's property, it has been held to mean that it gave him the power to invest her money. Sencerbox v. First National Bank, 14 Idaho, 95, 93 P. 369. When used in the title of an act relating to reform schools, it was held to include provisions in the act providing for the committing of certain juveniles to the schools. In re Sanders, 53 Kan. 191, 36 P. 348, 23 L.R.A. 603. See, also, Watson v. Cleveland, 21 Conn. 538; Commissioners of Sinking Fund v. Walker, 7 Miss. (6 How.) 143, 38 Am.Dec. 433; In re Brennan's Will, 251 N.Y. 39, 166 N. E. 797; City of Topeka v. Independence Ind. Co., 130 Kan. 650, 287 P. 708; Stagway v. Riker, 84 N.J.Law, 201, 86 A. 440. When a board of supervisors is given management of a county hospital, that body is given the power to adopt rules for the admission of patients, provided, of course, that they must admit those entitled by law to enter and cannot admit those whose reception is prohibited by law or the Constitution. In their rules of admission they should have the power to provide for the payment for care by those not financially able to secure hospitalization in a private institution, the amount to be paid to be determined in its maximum by the cost to the county of hospitalization of each individual patient and charged to the patient on his ability to pay. In the administration of public funds the supervisors are acting as trustees and they should so administer those funds as to lighten the taxpayers' burden as much as possible.

[11] Another class of patients which should be admitted to county hospitals deserves our consideration. In cases of public disaster, such as fire, earthquake, floods, storms, or epidemics, people may be injured or rendered suddenly ill and immediate hospitalization may be necessary to save life. The same is true in cases of accident or sudden illness. In such cases delays in admissions to permit investigations of the financial conditions of the patients might cause loss of life. Such patients should be admitted promptly; investigation of their abilities to pay should follow. Or-

dinary humanity could dictate no other course. In such cases boards of supervisors should not hestitate to collect the full cost of hospitalization from those able to pay, and from others not able to pay in full, a fair amount, to be determined after an investigation of their resources. We have stricken clause "i" from the decree of the trial court and have added another under the same letter to provide for such cases.

The decree in this case is not elastic. Over a period of years the Legislature has changed and increased the classes to be admitted to county hospitals. That body may continue with such legislation and may provide for the admission of new classes, or restrict those now admitted, or place new conditions upon admissions. To take care of this contingency we have added clause "j" to the decree.

Defendants complain that the decree as rendered is uncertain in several particulars. Plaintiffs in effect admit the charge by proposing amendments to it. We have studied the decree as amended by them and have concluded that it substantially meets the objections of defendants. On our own motion we have stricken one paragraph which plaintiffs proposed to retain, as we regard it as surplusage.

It is ordered that the decree of injunction rendered by the trial court on December 4, 1933, be modified by striking therefrom the words, letters, and figures not appearing in the decree of injunction hereinafter set forth and adding the words, letters, and figures appearing in the decree of injunction hereinafter set forth which do not appear in the said decree signed by the trial judge so that the decree of injunction in this case shall read as follows: (Following the title of the court and cause.)

The above entitled matter having been heretofore heard and determined by the undersigned Judge of the Superior Court of the State of California, written findings of fact and conclusions of law having been heretofore duly and regularly signed and filed herein ordering judgment in favor of the above named plaintiffs and against the above named defendants as hereinafter given and made, and the case being in all respects ready for final judgment and decree:

"It is therefore ordered, adjudged and decreed that the defendants Perry Brite, Stanley Abel, W. R. Woollomes, J. C. Hart, Chas. W. Wimmer, individually, and as members of the Board of Supervisors of Kern County, and Kern County, a legal subdivision of the State of California, and each of them, and every officer, deputy, agent, appointee, subordinate, servant, or employee of the above named defendants, or either or any of them, and particularly and especially the officers, deputies, agents, employees, appointees, servants, doctors, superintendents, heads of departments, internes, nurses, and assistants, and all other persons acting under defendants or any of them in any matter relating to the operation, maintenance, administration, or conduct of that certain County Hospital of the County of Kern known as the Kern General Hospital, be, and each of such persons is, and all of them are hereby forever permanently restrained, enjoined and commanded to desist from admitting to and receiving as patients of, caring for, curing, treating, boarding, nursing, furnishing food or supplies or lodging to, or hospitalizing in, said Kern General Hospital, or at or in any outpatient clinic thereof, any person who, after due inquiry and investigation, is not found to be an indigent person as herein defined, or a dependent or partially dependent person in case of emergency, or who is found, after due inquiry and investigation, to be a person who is himself, or has a relative or relatives legally liable for his support, able to pay for and obtain proper and necessary medical or surgical or hospital care or treatment or services for himself elsewhere than in the county hospital except as hereinafter specified. The following should be admitted: (a) an indigent sick or dependent poor person; (b) a needy sick and dependent or partially dependent citizen in case of emergency; (c) a psychopath, narcotic addict or habitual inebriate temporarily in custody; (d) a physically defective and physically handicapped person under the age of eighteen years when the parents or guardian of such person are not financially able to secure proper care or treatment and when such person's admission and treatment has been duly authorized in the manner provided by law; (e) a person in the active stages of tuberculosis, in wards established for the treatment of such persons, who is able to pay for such treatment and who, when able to pay, is required to pay for such treatment; (f) a person to be quarantined or isolated in the county hospital with a contagious, communicable or infectious disease; (g) a prisoner confined to any city or county jail who requires medical or surgical treatment necessitating hospitalization where

such treatment cannot be furnished or supplied at such jail when the Superior Court of the county shall have ordered the removal of such prisoner to the county hospital and said prisoner elects not to furnish such treatment at his own expense; (h) a county employee injured in the course of his employment by the county when hospitalization is reasonably required to cure and relieve the effects of such injury; (i) a person in need of immediate hospitalization on account of accident or sudden sickness or injury or by reason of sickness or injury caused by or arising in a sudden public emergency or calamity or disaster. Provided, (j) Nothing in this decree shall be construed as restraining defendants from obeying or carrying out or giving effect to any law that may be passed hereafter relating to the hospitalization of patients in county hospitals which may affect the hospital in Kern County.

"It is further ordered that plaintiffs have their costs herein expended taxed at $306.62.

"Done in open court this 4th day of December, 1933.

"K. Van Zante,

"Judge of the Superior Court."

As so modified, the judgment is affirmed. Each party will pay their own costs on appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

UNITED STATES GYPSUM CO. v. HART et al. *

Civ. 10686.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1936.

Rehearing Denied Feb. 27, 1936.

Hearing Granted by Supreme Court April 2, 1936.

1. Executors and administrators ⇐226

Illinois corporation having its principal place of business in Illinois could not file its claim against decedent's estate after expiration of statutory period on ground that it had not received creditor's notice, where corporation was authorized to transact business in California, and maintained office and force of employees in California (Probate Code, § 707).

2. Executors and administrators ⇐226

Judgment creditor's notice of motion to require defendant, who was then deceased, to furnish new undertaking on appeal did not constitute filing of creditor's claim against defendant's estate, notwithstanding that attorney upon whom notice was served had been appointed executor of estate, and that creditor had no notice of defendant's death (Probate Code, § 700 et seq.; §§ 705, 709).

3. Executors and administrators ⇐227(5)

Amendment to claim against estate cannot be allowed unless claim has been filed in estate proceedings within time allowed by law (Code Civ.Proc. § 473).

4. Executors and administrators ⇐433

Where suit is brought to establish rejected claim against estate, executor can contest every allegation of claimant (Code Civ.Proc. § 473).

5. Executors and administrators ⇐227(5)

Order of probate court permitting amendment to claim against estate did not preclude trial court from inquiring, in suit to establish claim after its rejection by probate court, into facts upon which order was based, notwithstanding that no appeal was taken from order permitting amendment (Code Civ.Proc. § 473).

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by the United States Gypsum Company against Karl W. Hart and another, as executors of the estate of Cornie W. Hart, deceased. From the judgment, plaintiff appeals.

Affirmed.

Gibson, Dunn & Crutcher and Ira C. Powers, all of Los Angeles, for appellant.

Elliot Gibbs, of Pasadena, for respondents.

GOULD, Justice pro tem.

Mrs. Cornie W. Hart died December 4, 1932. Prior to that time judgment against her and in favor of plaintiff corporation had been rendered in the superior court of Los Angeles county upon a stockholder's liability suit for the sum of $2,226.99, interest and costs. She, with other judgment debtors, had appealed to the District Court of Appeal, posting a surety company bond on appeal. While the appeal was still pending and after the death of Mrs. Hart, the surety company on the ap-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 60 P.2d 998.

peal bond went into receivership. Ignorant of the fact that Mrs. Hart had died and that her estate was in the course of probate, plaintiff served notice of motion to require Mrs. Hart to furnish a new undertaking on appeal. Service of this notice was made May 16, 1933, upon Fred E. Peterson, one of the attorneys for Mrs. Hart in the stockholder's liability action. At the time of such service, which was five months after Mrs. Hart's death, Mr. Peterson had qualified as one of the executors of her estate and was attorney for the executors. At that date the time had not expired within which claims against the estate might be presented.

Neither plaintiff nor its attorneys had any actual knowledge of the death of Mrs. Hart until November 6, 1933, approximately four months after the time for filing claims against her estate had expired. It then prepared and filed a creditor's claim against the estate. Thereafter, in the probate proceeding, under date of December 27, 1933, the corporation gave notice of motion for leave to file an amended claim, and on January 4, 1934, an order was entered in the probate court permitting plaintiff herein to file in the estate proceedings of Mrs. Hart "said amended creditor's claim with the same effect as though it had been filed on the date of the notice of motion referred to in said claim," i. e., May 16, 1933. The notice of motion to which reference is made in the above quotation from the probate court's order is the motion made in the civil case then on appeal, calling upon Mrs. Hart to furnish a new undertaking on appeal. Pursuant to the permissive order of the probate court, the "amended claim" was filed, was rejected by the executors of Mrs. Hart's estate, and the within action upon such rejected claim was filed February 19, 1934.

The trial court found that plaintiff did not present its claim within the time allowed by law, and that the probate court had no authority to permit the filing of the so-called amended claim after the expiration of the statutory period. From the judgment in defendant's favor, plaintiff appeals.

Before the trial date of the within action, the District Court of Appeal affirmed the original stockholder's liability judgment (United States Gypsum Co. v. Snyder-Ashe Co., 139 Cal.App. 731, 34 P.(2d) 767), which thereby became final.

[1] When appellant first discovered in November of 1933 that Mrs. Hart was dead and that time for filing creditors' claims against her estate had expired, it endeavored to place itself under the protection of section 707 of the Probate Code, allowing the filing of claims after the expiration of the statutory period and before the decree of distribution provided a satisfactory showing be made that the claimant has not received notice by reason of being out of the state. The issue was raised by the pleadings at the trial of the within action, wherein the court found that during all the period of time in question appellant, although a corporation organized under the laws of the state of Illinois and having its principal place of business in Chicago, Ill., nevertheless was duly authorized to transact business in the state of California, maintained an office in Los Angeles, had filed a copy of its articles of incorporation with the secretary of state, had designated a resident agent in California upon whom service of process might be made, had a force of employees in its Los Angeles office, and had sold more than $800,000 worth of merchandise in California in the year 1933. The court's conclusion that appellant was not out of the state of California in 1933, and therefore had at least constructive notice of the publication of notice to creditors in the Cornie W. Hart estate, followed irresistibly from the above findings.

[2-5] If appellant has any right to maintain this action, it must be founded upon the theory that when, on May 16, 1933, it presented to Fred E. Peterson a notice of motion requiring Cornie W. Hart, then deceased, to furnish a new undertaking on appeal in the stockholder's liability case, it in effect was filing a creditor's claim informal and irregular in form though it may have been, against the estate of Cornie W. Hart, deceased. The order of the probate court permitting an "amended claim" to be filed as of date May 16, 1933, can refer only to the notice of motion in the civil case then on appeal. It is true that the attorney upon whom the notice of motion was served had been one of Mrs. Hart's attorneys in the stockholder's liability case in her lifetime, and it is true that he appeared in opposition to the motion and without any substitution of executors for the deceased judgment debtor. It is also true that at the time of receiving the notice of motion he was one of the executors of Mrs. Hart's estate and

was attorney for the executors. Also, there can be no dispute that no intimation was given appellant as to the death of Mrs. Hart. Nevertheless, all these facts tending to excuse appellant's failure to file a formal claim against the estate cannot be accepted as a substitute for compliance with the requirements of sections 700 et seq. of the Probate Code, relating to the presentation of claims against estates of deceased persons. While the filing of the notice of motion in the stockholder's liability suit indicated to the executors of Mrs. Hart's estate that appellant was attempting to pursue its rights against the debtor and had not abandoned its action, it was after all a proceeding in the civil action and not, either in the contemplation of the parties or by any possible construction at a later date, to be regarded as a claim against the estate of the decedent. It lacked the supporting affidavit, the specification as to amounts due and offsets, and numerous other details required by the Probate Code.

It is true the court may, under the provisions of section 473 of the Code of Civil Procedure, allow an amendment to a claim in a proper case (Davis v. Superior Court, 35 Cal.App. 473, 170 P. 437), but the same decision is authority for the proposition that the allowance of an amendment presupposes that a claim has been filed in the estate proceedings within the time allowed by law.

Appellant's contention that the order of the probate court permitting the amendment is conclusive because no appeal was taken therefrom, and that the trial court in this case could not inquire into the facts upon which that order was based, is conclusively answered by the Supreme Court in the case of Tropico Land, etc., Co. v. Lambourn, etc., 170 Cal. 33, 148 P. 206, 210, holding that where a claim is rejected and suit brought to establish such rejected claim "the whole matter [is] at large" and the executor is entitled to contest every allegation of the claimant.

It must be held that appellant herein failed to comply with the provisions of the Probate Code (section 700 et seq., and particularly sections 705 and 709), and that therefore its claim is barred.

Judgment affirmed.

We concur: WOOD, Acting P. J.; McCOMB, Justice pro tem.

11 Cal.App.2d 595

SLEEPER v. WOODMANSEE et al.

Civ. 5391.

District Court of Appeal, Third District, California.

Feb. 3, 1936.

Hearing Denied by Supreme Court April 2, 1936.

1. Automobiles ⇐195(2, 4)

Except for statutory liability of persons signing minor's application for driver's license, parents *held* not liable for negligence of minor operating parents' automobile contrary to their express command and not pursuing parents' business nor engaged as their agent (St.1923, p. 532, § 62, as amended by St.1929, p. 522).

2. Automobiles ⇐184

Under statute, negligence of minor, aged 19, in operating parents' automobile *held* imputed to parents signing minor's application for driver's license, notwithstanding license was then suspended due to fact that justice had "revoked" license for six months (St.1923, p. 532, § 62, as amended by St. 1929, p. 522; St.1931, pp. 2110, 2120, §§ 72, 113).

3. Automobiles ⇐144

Motor vehicle operator's license confers no vested right, being revocable for reasons and in manner provided by law (St.1929, p. 537, § 112; St.1931, p. 2110, § 72).

4. Automobiles ⇐6

Motorist's liability for negligence is determined by law at time of tort, not at time of granting of driver's license (St.1923, p. 532, § 62, as amended by St.1929, p. 522).

5. Automobiles ⇐184

Under statute, parents signing minor's application for driver's license guarantee payment of damages resulting from minor's negligence or violation of law existing while he is operating automobile (St.1923, p. 532, § 62, as amended by St.1929, p. 522).

6. Automobiles ⇐144

Justice of peace has no power to revoke or restore operator's license; such power being delegated exclusively to motor vehicle department, with certain exceptions (St. 1929, p. 537, § 112; St.1931, p. 2110, § 72).

7. Automobiles ⇐184

Under statute, parents signing minor's application for driver's license *held* liable for minor's negligence in operating parents' automobile, independently of any doctrine of agency (St.1923, p. 532, § 62, as amended by St.1929, p. 522).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

⇐ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by W. H. Sleeper against Robert Woodmansee, Sr., and others. Judgment for plaintiff, and defendant named and wife appeal.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Jerome D. Peters, of Chico, for appellants.

Coyle Bybee, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Robert Woodmansee, Sr., and wife have appealed from a joint judgment which was rendered against them and their minor son Robert for injuries sustained by the plaintiff in an automobile casualty which occurred while the son was driving their machine without their knowledge and contrary to their positive command. At the time of the accident the son held a driver's license which was issued with the written approval of his parents, but which was then temporarily suspended by order of a justice of the peace. The transcript of evidence is not before us. It is contended the findings are contrary to law and that the judgment is not supported thereby.

The court found that the appellants owned the automobile in question; that the minor, who was nineteen years of age at the time of the accident, on the written request of his parents, was granted a driver's license to operate an automobile, September 5, 1928, pursuant to section 62 of the California Vehicle Act as it then existed; that the license was temporarily suspended December 26, 1933, for a period of six months, by order of the justice of the peace of Chico township in Butte county, upon conviction of violating section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120); that on December 31, 1933, the appellants' automobile was intrusted to one George Teron for a pleasure excursion, in which machine their son rode as a passenger; that the appellants forbade their son on that particular occasion to operate the machine and exacted a promise from him and from Teron that he would not do so, but that, contrary to their command, the son took charge of the machine immediately after leaving their presence and was operating it "without the knowledge or consent of said parents, or either of them, and contrary to their express command," when a collision occurred on the public highway between their car and another automobile driven by one Loren Estes, which resulted in serious injuries to the plaintiff, W. H. Sleeper, who was riding as a guest in the last-mentioned machine; that the accident resulted as the proximate cause of the negligence of the appellants' son, which negligence is imputed to appellants and that the plaintiff sustained damages as a result thereof in the sum of $2,447. A joint and several judgment for that sum was thereupon rendered against the appellants and their minor son. From that judgment the parents only have appealed.

It is contended the appellants are not liable for the negligence of their minor son under the circumstances of this case for the reasons that he was not driving the automobile as their agent at the time of the accident, and that they were relieved from liability as signers of his application for a driver's license under the provisions of section 62 of the California Vehicle Act (St. 1923, p. 532), since his license was suspended and therefore not in force at the time of the accident.

[1] Except for the statutory liability created by the provisions of section 62 of the California Vehicle Act, by virtue of the parents signing their minor son's application for a driver's license, under the circumstances of this case, they were not liable for his negligence because he was operating their car contrary to their express command and he was not then so engaged as their agent or in pursuit of any mission or business in their behalf. Perry v. Simeone, 197 Cal. 132, 239 P. 1056; Rocha v. Garcia, 203 Cal. 167, 171, 263 P. 238; Ormston v. Lane, 90 Cal.App. 481, 487, 266 P. 304; 20 Cal.Jur. p. 450, §§ 47 and 48.

[2] We are of the opinion the negligence of the minor son of the appellants is imputed to them under the provisions of section 62 of the California Vehicle Act, by virtue of their having signed his application for an operator's license, which was not revoked or canceled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended.

At the time the operator's license which is involved in this suit was issued section 62 of the California Vehicle Act (St.Cal.1923, p. 532) provided:

"Sec. 62. *Applications of minors.* (a) The application to the division of any minor for an operator's license shall not be granted unless such application is signed by both the father and mother of the applicant if both the father and mother are living and have custody of the applicant, otherwise by

the parent, guardian, employer or other person having the custody of such minor.

"(b) Any negligence of a minor *so licensed* in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence."

In 1929 subdivision (b) of the preceding section was amended by eliminating the italicized words "so licensed." St.1929, p. 522. At the time of the accident that provision read: "(b) Any negligence of a minor in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence except in the event the minor is driving a motor vehicle as the agent, or servant or upon the business of a person *other than the person who has signed said application.*"

[3-5] The appellants argue with considerable force that since this accident occurred before the preceding amendment was made, that the negligence of their minor son may not be imputed to them for the reasons that he was not "so licensed" at that time, his license having been suspended by the justice of the peace of Chico township, and that he was then driving the car as the agent and upon the business of George Teron to whom the machine had been intrusted by his parents. We cannot agree with this construction of the law. The operator's license does not confer a vested right. The license is a mere privilege to drive a motor vehicle, which is subject to revocation for the reasons and in the manner provided by law. Both the regulation of a motor vehicle driver and the liability for violation thereof are subject to changes of the law. The operator's liability for negligence in driving an automobile will be determined by the law in existence at the time of the alleged tort. It is not determined by the state of the law at the time his license is granted. The contract which is assumed by the parents' written approval of their minor son's application for an operator's license is a guaranty that they will pay any damages which may result from his failure to conform to the law as it exists while he is driving an automobile and for any negligence on his part which occurs by virtue of his operation of the car. Lundquist v. Lundstrom, 94 Cal.App. 109, 270 P. 696. The language found in 23 Cal.Jur. p. 683, § 73, applies to the present case where the question of liability for the negligent operation of an automobile under a license is involved. It reads: "A statute as amended operates precisely as though the subject matter of the amendment had been originally incorporated therein, as regards any action had after the amendment is made."

At the time this accident occurred on December 31, 1933, subdivision (b) of section 62 of the California Vehicle Act had been amended and the language "so licensed," upon which the appellants rely as a limitation of their liability, had been eliminated.

Moreover, the construction of the meaning of those words "so licensed" is too narrow an interpretation of the statute. In our opinion that language may not be construed to mean that the appellants' liability by virtue of their signing the application for their minor son's license is abrogated during the period that it is merely suspended, provided the license is not then revoked. That construction would deprive the public of the security against illegal and negligent operation of a machine, which is the very purpose for which the motor vehicle law is enacted. In the case of Easterly v. Cook, 140 Cal. App. 115, at page 121, 35 P.(2d) 164, 167, this court said in that regard:

"The statutory liability for imputed negligence which is created by section 62 of the California Vehicle Act against one upon whose signed application an operator's license to drive an automobile is issued to a minor, does not depend upon the relationship or continued control over the minor, on the part of him who signs the application. It is a separate statutory liability during minority, or until canceled under the provisions of subdivision (e) of section 62 of the act * * * which is created by signing the application for the license and thereby vouching for the careful conduct of the driver. * * *

"We are of the opinion the statutory liability is imposed upon the signer of the application for an operator's license by a minor, independent of the general liability of a parent for the torts of his minor child, on the theory that an automobile is a dangerous instrumentality, the operation of which may not ordinarily be safely intrusted to a minor child on account of a lack of judgment on his part. This liability is deemed to cover the operation of the ma-

chine during the years of indiscretion of the minor, and until he reaches the age of majority, * * * unless the license is canceled pursuant to subdivision (e) of section 62 of the California Vehicle Act. The liability created by that section is not dependent upon the continued authority of the signer of the application. It is a guarantee of compensation for the negligence of the child during minority."

[6] In the present case, the license had not been revoked at the time of the accident upon application of the appellants, by the court, by the motor vehicle department, or at all. It is true that upon conviction of violating the provisions of section 113 of the California Vehicle Act, the justice's court ordered "that the driver's license of said minor be revoked for a period of six months." Clearly this was not a revocation of the license, but on the contrary it was a mere suspension thereof. That is evidenced from the fact that the order specifies that the prohibition against the licensee driving an automobile was limited to a period of six months. A justice of the peace has no power to revoke or restore an operator's license. That power is delegated exclusively to the motor vehicle department, except that under the provisions of section 112 of the act (St.1923, p. 553, as amended by St. 1929, p. 537), a court may revoke the license of a driver of an automobile after he has been convicted of operating it on the public highway under the habitual influence of narcotic drugs or intoxicating liquor. Section 72 of the act (St.1923, p. 534, as amended by St.1931, p. 2110) pursuant to which the order in this case was made limits the authority of a court to suspending a driver's license for the maximum period of six months. From the fact that the appellants' son had been three times convicted of violating the California Vehicle Act they had ample warning that he was a dangerous driver. If they had desired to be relieved of liability on account of signing his application for a license, they could have petitioned the department therefor under the provisions of subdivision (e) of section 62 of that act (St.1923, p. 532, as added by St. 1929, p. 522). They failed to do so. Since the license was merely suspended for a limited time and not revoked, the appellants were not relieved of liability for their son's unlawful or negligent operation of the machine.

The respondent contends that the attempted suspension of the license was ineffectual and invalid because the license was not indorsed as suspended by the justice of the peace as required by subdivision (d) of section 72 of the act (St.1923, p. 532, as amended by St.1931, p. 2110). This failure to so indorse the license was because it was not in the possession of the justice, having been retained by a police judge in whose court the licensee had been previously convicted of another offense under the California Vehicle Act. It is unnecessary to pass upon that point in view of what we have said respecting the liability of the appellants during the period that the license was merely suspended.

The case of Bradford v. Sargent, 135 Cal. App. 324, 27 P.(2d) 93, 95, upon which the appellants rely regarding the question of their liability for the negligence of their son in driving the machine during the time that his license was temporarily suspended, is not in conflict with what we have previously said. It is true that in the Bradford Case the minor son's license was suspended at the time of the accident which was the basis of a judgment rendered against the father of the licensee as the signer of his application therefor. That judgment was, however, reversed on the ground that the automobile was not being driven by the son of the appellant, but on the contrary it was then being operated by another licensed individual without the knowledge or consent of the owner. The court said: "The contention that appellant's liability was fixed under the terms * * * of the California Vehicle Act has been resolved in favor of the appellant by the case of Lundquist v. Lundstrom, 94 Cal.App. 109, 270 P. 696, regardless of any question of the effect of the suspension of Andy's operator's license by the police court. * * * We conclude that, under authority of Lundquist v. Lundstrom, supra, there could be no liability on the part of appellant because his son was not driving the car at the time of the accident."

[7] There is no merit in the contention that the appellants are relieved of liability for the reason that they had authorized George Teron to drive their car and that their son operated the machine as his agent. There is no showing that Robert Woodmansee, Jr. was driving the automobile as the agent of Teron. The two boys were jointly engaged in an expedition for pleasure. The appellants are deemed to be liable for their son's negligence independently of the doctrine of agency and solely because of the

statutory liability created as a result of their signing his application for the license.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



DUNBAR et al. v. ANDERSON et al., and three other cases. *

Civ. 1613.

District Court of Appeal, Fourth District, California.

Feb. 7, 1936.

Rehearing Denied March 5, 1936.

Hearing Granted by Supreme Court April 6, 1936.

1. Mines and minerals ⇐101

Evidence *held* to sustain finding that there was sufficient disclosure of material facts regarding trustees' conduct concerning oil syndicate to subsequent unit holders, that profits taken by trustees could not be required to be returned on ground that they were secret.

2. Mines and minerals ⇐101

Where original trustees had agreed on general plan before acquiring oil lease and had come to understanding with owner and lease was recorded and corporation commissioner's permit fully set forth amount one trustee was to receive, subsequent unit holders *held* not injured because such trustee made division with other trustees.

3. Mines and minerals ⇐101

Where trust agreement imposed duty on trustees to sell units and each trustee collected salary during time he was selling units, commissions received by trustees for making sales *held* required to be returned to trust estate, notwithstanding trustees gave portion of commissions to buyers of units.

4. Mines and minerals ⇐101

Where trust agreement, regarding oil development of specific property, was amended to authorize trustees to develop other property, fact that new projects failed to produce oil did not render trustees liable on ground that they exceeded their power.

5. Mines and minerals ⇐101

Oil trust agreement authorizing trustees to use not to exceed 10 per cent. of all moneys received to defray expenses *held* to fix limitation at 10 per cent. of gross and not net income.

6. Mines and minerals ⇐101

Evidence *held* insufficient to sustain finding that amounts taken as compensation by trustees of oil syndicate did not exceed reasonable value of services rendered.

7. Mines and minerals ⇐101

Where oil development trust agreement gave trustees right to fix their compensation, subject to limitation that all overhead expenses should not exceed 10 per cent., trustees *held* required to fix their compensation in amount reasonable in view of services actually rendered, and could not take all that remained of 10 per cent. after paying other overhead expenses.

8. Mines and minerals ⇐101

Where oil development trust agreement authorized trustees to fix elected officers' and their own compensation, trustees *held* not justified in taking double salary, one for detail work as elected officer and other for general executive services as trustee.

9. Mines and minerals ⇐101

Oil syndicate trustees' settlement of unit holder's action against trustees *held* not to constitute fraud necessitating their removal, where settlement was with understanding that trustees should bring action for declaratory relief and agreement was at once carried into execution.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Hooper C. Dunbar and others against E. L. Anderson and others, wherein L. V. Redfield filed cross-complaint against Hooper C. Dunbar and others, and against Guy S. Riley and others, and wherein Guy S. Riley and others filed cross-complaints against L. V. Redfield and others, and wherein Walter F. Haas filed complaint against L. V. Redfield and others who filed cross-complaints against Walter F. Haas and others. From the judgment, L. V. Redfield and Guy S. Riley and others appeal.

Judgment reversed, and cause remanded, with directions.

See, also, Riley v. Dunbar, 1 Cal.(2d) 143, 33 P.(2d) 828.

George L. Hampton, of Los Angeles, for appellant Riley and others.

Joseph L. Lewinson, Morris E. Cohn, and Erwin P. Werner, all of Los Angeles, and J. W. Falkner, of El Monte, for appellant Redfield and others.

Walter F. Haas, H. C. Johnston, Stanley F. Maurseth, G. E. Kerrin, and Haight,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 61 P.2d 744.

Trippett & Syvertson, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief brought by the trustees of a common-law trust for the purpose of establishing the meaning and intent of the declaration of trust upon which the association was founded.

The Bell View Oil Syndicate, which will hereinafter be referred to as the syndicate, was organized on January 20, 1922, for the purpose of drilling for oil on a town lot in Santa Fé Springs consisting of about one-third of an acre. The declaration of trust which was signed on that day by the five organizers appointed the signers thereof as trustees with the power to fill any vacancies. One of these trustees resigned shortly thereafter and the plaintiff Morris took his place. Two of the trustees died in 1925 and, without filling the vacancies, the three plaintiffs have continued to administer the affairs of the trust.

The declaration of trust, after providing that the trust estate should consist of 5,000 units of the par value of $100 each, provided that 1,000 of these units should be given to H. W. McFarlane, one of the original trustees, in consideration of the transfer to the trust estate of a lease on this town lot. It was then provided that the trustees were to sell such additional units as might be necessary to provide funds for carrying out the objects of the trust, subject to the approval of the commissioner of corporations. The lease was transferred to the trust by McFarlane and 1,000 units were issued to him. In order to secure funds with which to drill for oil, the trustees sold units of beneficial interest in this trust, and at the time of the trial of this action there were outstanding such units of the par value of $300,000, of which the three plaintiffs owned nearly one-fifth. The venture was highly successful and, at the time of the trial, more than $5,000,000 had been received for oil produced from this lot and the dividends paid to the unit holders averaged 64 per cent. a year on the par value of the units.

A number of suits were brought against the trustees by various unit holders, and finally this action was brought by the trustees for the purpose of having an adjudication as to the meaning and intent of the declaration of trust and as to their rights under this instrument. The complaint sets out all of the claims that had theretofore been raised by any unit holders with regard to the manner in which the trust had been administered, with a statement of the trustees' contentions with respect thereto. Cross-complaints were filed by certain of the unit holders alleging that the trustees had taken secret profits, that they had wasted funds of the trust in wildcat operations, that they had taken compensation as trustees to which they were not entitled, that in various other respects they had been guilty of mismanagement of the trust, and praying for their removal as such trustees. The trial court found in all respects in favor of the plaintiff trustees and this appeal followed.

The first point raised is that the units issued to McFarlane in exchange for the lease were divided among the five original trustees and constituted a secret profit which, under the law, must be returned to the trust estate, together with all income therefrom. It is argued that the original trustees planned the organization of this syndicate before they secured the lease in question, that they became trustees from that moment, and that anything done by them thereafter must accrue to the benefit of all subsequent unit holders since there was no disclosure of the facts.

The appellants rely upon Burbank v. Dennis, 101 Cal. 90, 35 P. 444, and Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243. In the first of these cases, the promoters of a corporation falsely represented to the proposed stockholders that they were conveying lands to the corporation at cost, when in fact they turned in the land at an increased price and took the resulting profit out of the cash paid by purchasers of stock. In the second case, one of the promoters concealed the facts that he was making a profit from a similar transaction and that he was one of the organizers of the corporation. It was there held that after starting such an enterprise one of the organizers thereof could not purchase property and sell it to the company at an advance in price in the absence of a full disclosure of the facts. It was further held that this duty if disclosure was owed to those persons who were induced to come into the enterprise and that, in that case, a subscription agreement which was signed by subsequent purchasers of stock failed to make such a disclosure.

The appellants rely upon the following facts as bringing this case within the rules laid down in the cases just referred to: On

January 10, 1922, the five persons who later became the original trustees in this syndicate signed a written agreement setting forth that they were desirous of forming a syndicate for the purpose of acquiring an oil lease from H. W. McFarlane, one of the five, covering this lot in Santa Fé Springs; that it was essential to this plan to secure a lease of the property; that they authorized McFarlane to take the lease in his own name for the purpose of transferring it to a syndicate to be organized; that such a syndicate should be capitalized on a unit basis with 5000 units of $100 par value each; that the parties to this agreement should constitute the trustees; that each party thereto would subscribe for 10 units at $100 each when the syndicate was organized; that 1,000 of these units should be taken as promotion stock for and in consideration of the lease; that a portion of the 1,000 shares should be given as a bonus to the first purchasers of units in the syndicate; and that 20 units out of the 1,000 should be given to certain persons named for services already rendered. On January 12, 1922, McFarlane secured a written lease, providing that the lessor should receive one-third of all oil produced and should receive, within fifteen days, $4,000 in cash to be treated as an advance on his first royalty. This $4,000 was later paid out of the proceeds of the sale of units, each trustee paying in $1,000 for ten units in accordance with their agreement. It should also be observed that, in accordance with the agreement, 245 of the units exchanged for the lease were given as bonuses to the first purchasers of units and the remaining 755 of these units were divided among the five trustees.

The controlling question is whether there was such a disclosure of the essential facts to subsequent purchasers of units as is required by the rule laid down in the cases above referred to. Certain other facts have a bearing on this question. The respondent Horton spent three months looking over the Santa Fé Springs field in search of a lease which he might develop. He found the property in question, and before associating himself with any one else he agreed with the owner of the land on the terms of the lease. He then selected the persons who became the other trustees to assist him in raising funds with which to develop the property. The agreement of January 10, 1922, the securing of a written lease, and the organization of the syndicate followed. For convenience the lease was taken in the name of McFarlane and transferred by him to the syndicate. The agreement of January 10, 1922, was kept at all times in the office of the syndicate in a file marked "Trust Papers," was always available, was handed with the other papers to an auditor examining the records of the syndicate on behalf of certain unit holders, and was produced at the trial.

A permit to issue and sell units was obtained from the commissioner of corporations, copies of the declaration of trust and the lease being attached to the application therefor. The application set forth that McFarlane, as owner of the lease, was to transfer it to the syndicate, in exchange for 1,000 units, subject to the approval of the commissioner, and that each of the applicants had subscribed for 10 units and had paid $1,000 into the treasury, out of which it was proposed to pay the $4,000 called for by the lease. Permission was asked for the issuance of 1,000 units to McFarlane in exchange for the lease and for the sale of other units to be sold so as to net 80 per cent. of the selling price. The commissioner was also asked to approve the plan of using a portion of the units to be issued to McFarlane for the purpose of giving a 50 per cent. bonus in units on the first 300 units actually sold and a 25 per cent. bonus on the next 300 units sold. A permit was issued, reciting the general facts outlined in the application, and granting permission to sell units as requested and to issue 1,000 units to McFarlane in exchange for the lease, describing the same and giving the book and page where it was recorded. The permit further provided that these units should be placed in escrow and not released until the further order of the commissioner, and that a copy of the permit be delivered to each prospective purchaser of units. The McFarlane units were placed in escrow and were later released and divided among the five trustees, after a showing as to the amount already paid to other investors. The certificates of beneficial interest issued to purchasers contained a reference to the declaration of trust, with a statement that it was recorded in the office of the county recorder of Los Angeles county, and each purchaser signed a written acknowledgment that he had received and read a copy of the permit. Other permits were later issued with relation to which similar facts appear.

[1, 2] Assuming that these persons were acting as trustees from the date of their

original agreement, January 10, 1922, we think the evidence sustains the court's finding that there was a sufficient disclosure of the material facts to subsequent unit holders, and that it cannot be said that secret profits were taken which must be returned to the trust estate. Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 P. 838. The original trustees acquired the lease before this syndicate was organized and before any other unit holder acquired any interest therein. While they agreed upon the general plan to be followed before acquiring a written lease, they had sought out and discovered the property and come to an understanding with the owner thereof before entering into the agreement of January 10, 1922. The lease was on record, its exact terms were set forth in the declaration of trust, and both were furnished to the corporation commissioner. The permit fully referred to both instruments and clearly set forth what McFarlane, one of the trustees, was to receive. So far as subsequent unit holders were concerned, the material fact was that such a consideration was to be paid. This being well understood and agreed to, a subsequent unit holder was in no way injured by the fact that the consideration he was willing to pay in order to acquire an interest in the lease was to be divided with the other organizers of the syndicate. Victor Oil Co. v. Drum, supra.

[3] The second point raised is that the trustees should be compelled to return certain commissions they paid themselves on the sale of units. Each of the original trustees sold units on which they retained the 20 per cent. commission allowed under the terms of the permit. The court found that these trustees were licensed brokers, that these sales of units were made by them in their individual capacity and not as trustees, that the commissions were legally paid, and that the trustees were not required by the declaration of trust to make such sales as trustees thereof and without compensation.

The trust agreement made it the duty of the trustees to issue and sell such units as might be necessary to provide funds to carry out the objects of the trust. Each of the trustees collected a salary of $150 a month covering the time he was selling these units. Each was acting as a trustee not only for the syndicate as it then was, but also for subsequent unit holders. As such trustees they were without authority to act for the syndicate in a contract with themselves. Since all were involved in the transaction, there remained no authorized persons to make such an agreement with them. We think these commissions were illegally taken and should be returned to the trust estate. Pasadena Mercantile Finance Corporation v. De Besa, 122 Cal.App. 575, 10 P. (2d) 492. Only two of the original trustees are involved in this action, and the record shows that respondent Horton received $3,280 as such commissions and the respondent Dunbar received $8,985. The respondents point out that the trustees gave a portion of the commissions which they received to parties to whom they sold units. We cannot see that this affects the situation since these buyers of units were not authorized to receive such commissions and since the trustees had no right to give away something to which they were not entitled.

It is contended that the trustees secured an amendment to the trust agreement by false representations and that the amendment is invalid. The trust agreement provided that it might be amended with the consent of two-thirds of the unit holders. In 1925, it was so amended as to permit the trustees to build up a reserve fund and to invest in new ventures aside from the original lease. It is argued that a letter which the trustees sent out asking consent to this amendment gave certain reasons therefor, whereas their testimony discloses other reasons. It is also argued that this letter was fraudulent because it contained a dividend check for 10 per cent. which was calculated to put the unit holders in a mellow frame of mind, and because it falsely stated that the trust estate had lost valuable opportunities, and held out the hope that other lucrative properties in the Santa Fé Springs field might be obtained if the trustees were permitted to build up a reserve which might be used for that purpose. More than two-thirds of the unit holders consented in writing to this amendment and the trial court found against the appellants on all allegations of fraud with respect to this transaction. The evidence fully sustains these findings and we find nothing therein which would have sustained a finding to the contrary.

[4] It is next contended that the trustees exceeded their powers by investing portions of the trust funds in leases and properties other than in the Santa Fé Springs field. It is claimed that the trustees spent approximately $400,000 in an effort to develop oil on some fifteen leases or projects outside of that field, without success except for

one in the Signal Hill field which was only moderately successful. This entire project was started for the purpose of discovering and developing oil wells and, after a considerable measure of success had been obtained, the unit holders amended the trust agreement for the specific purpose of authorizing and enabling the trustees to extend their operations and attempt to develop and produce oil on other properties. The fact that most of the later ventures were not successful in no way indicates that the trustees exceeded the authority thus given in attempting to carry out the wishes of the unit holders. The appellants argue that the trustees were only authorized "to develop * * * oil properties," that most of the new projects failed to produce oil, and that therefore they were not developing oil properties and were acting in excess of their power. The trustees made a full and complete report of all of these transactions to the successive annual meetings of unit holders, the trust agreement was amended to permit them to do just such things, and the entire circumstances, as shown by the evidence, do not support the narrow construction now sought to be placed upon the power granted.

Some contention is made that the trustees improperly accumulated a large reserve and that the original provision that 90 per cent. of the income should be paid out in dividends must be taken as showing the real intention of the parties. We are unable to follow this line of reasoning in view of the amendment adopted and the subsequent conduct of all of the parties.

[5] Another clause of the trust agreement, after providing that the trustees should have power to drill for, develop, and remove petroleum and kindred substances from the real property described therein or from any other property which might be acquired by the trustees, contained the following: "said trustees are hereby vested with the sole power and discretion to discern what will constitute principal and what will constitute gross income therefrom and net income available for payment or distribution under the terms of this trust, provided, however, that not to exceed ten (10) per cent. of all moneys received by the trustees shall be used to defray office expenses, officers' salaries and all overhead expenses." The appellants maintain that the limit thus provided means 10 per cent. of the net income and not of the gross income. It is also contended that the trustees in their annual accounts failed to list items as overhead which properly come within that designation. While we think the clause referred to was intended to fix the limitation at 10 per cent. of the gross income neither of these points require further consideration under the view we take of the next point raised.

One of the main contentions is that the respondents took large amounts as compensation for themselves, which were unreasonable and not justified by the terms of the trust agreement or by the work done, and after they had already fixed their compensation in lesser amounts.

The trust agreement provides that the trustees shall *elect* a president, vice president and secretary, and that they shall have authority to *appoint* such other *officers* and agents as they deem necessary. It then provides as follows: "The trustees shall fix the compensation of any and all officers and agents whom they may *appoint* or employ, and are likewise authorized to pay to *themselves* such compensation for their own service as they may deem reasonable, but in no event shall said total compensation exceed the ten (10) per cent limitation herein set forth in this contract." The limitation here referred to is the one above quoted, and concerning which the respondents alleged in their complaint: "that said declaration of trust in truth and in fact provides that said trustees are entitled to retain the balance of said 10 per cent after paying office expenses, officers' salaries and all overhead expenses as herein defined as compensation for their services as such trustees."

On April 7, 1922, the board adopted a resolution reciting that whereas the duties of respondent Horton, as secretary, had so increased that it would be unfair for him to continue his services without compensation, and whereas the board had power to fix the salary of its officers, it was ordered that the said Horton be employed as secretary for a period of five years at a salary of $350 per month, payable monthly, and that he should devote his entire time and attention to the business of the syndicate. Horton devoted his entire time to the syndicate thereafter and was paid that amount monthly until August, 1929. On April 22, 1924, the trustees voted themselves $150 per month from January 20, 1922, to April 20, 1924, "in consideration of the time given by each of the trustees to the affairs of the syndicate, and of the value of the services rendered."

This amount was paid to each of the five trustees in addition to the other amounts paid to Horton. Beginning on August 8, 1929, Horton was raised to $500 a month and respondent Dunbar was paid $350 per month. Beginning with January, 1932, respondent Morris was given a salary of $100 a month, the resolution reciting "that it is necessary for trustee Morris to attend more regularly, to called meetings than usual, and whereas, it is the decision of the board of trustees that trustee Morris is entitled to an additional remuneration for his extra attendance." In addition to any salaries thus fixed, beginning with December, 1924, and at intervals thereafter, the trustees took out large amounts as claimed compensation, each taking the same amount. Two trustees died in 1925 and the vacancies were not filled but the respondents continued to divide among themselves approximately the entire balance of 10 per cent. of the moneys received after deducting other office expenses and overhead. Up to the end of 1933, they had drawn as compensation, including monthly salaries, a total of $433,963, of which Horton received $174,163, Dunbar $138,500, and Morris $121,250. During the same period they had declared dividends of $1,882,000, of which they had themselves received approximately one-fifth. During certain years the compensation drawn by these respondents greatly exceeded the dividends paid to other unit holders. For instance, during 1929 the three respondents received as compensation alone $91,750, during 1930, $95,700, and during 1931, $56,700, while during each of these years only $50,000 was paid to all other unit holders. It further appears that the respondents, during the entire period, intended to take as compensation all that remained of 10 per cent. of the gross income, after paying other office expenses and other overhead, although they left a small amount to cover any possible error in computation. All amounts taken as compensation by the trustees were reported in their annual accounts merely as "overhead" expenses, without being set forth as compensation to them.

With respect to the matter of compensation the trial court found as follows:

"That it is true that said plaintiff trustees at all times during the life of said trust, have drawn as compensation sums constituting less than the balance remaining of the 10 per cent of all moneys received by said syndicate during the life of said trust, set apart thereunder for the payment of all overhead expenses, including compensation of trustees for their services as such trustees, * * * and it is true that said plaintiff trustees have the right to set aside and accumulate the balance remaining of said 10 per cent, or any balance of said 10 per cent remaining in the future, after deducting therefrom office expenses, officers' salaries, all overhead expenses and trustees' compensation for the payment of trustees' compensation in the future and during the life of said trust, and while such trustees continue to render services to said trust, and that during the life of said trust the unit holders thereof have no right to the distribution thereof, and that the plaintiff trustees have the right to draw thereon for their compensation as and when said plaintiff trustees in their discretion deem that they have earned or are earning more compensation than the then present receipts of said syndicate would enable them to pay under the 10 per cent clause. * * * That it is not true that the plaintiff trustees have taken and/or appropriated any sum or sums of money to their own use, or to the use of any of them, save and except such sums as authorized by them under said declaration of trust to be taken for their compensation, which compensation was, in the exercise of a sound discretion of said trustees, a reasonable and proper charge for the services rendered by them and each of them to said trust, and it is not true that any sum or sums of money taken as compensation by the plaintiff trustees, or any of them, was in excess of the amount permitted and/or authorized by the declaration of trust and amendments thereto, and it is not true that any sums so taken were and/or are in excess of the reasonable value of the services rendered by such plaintiff trustees, and each of them, to said Bell View Oil Syndicate, the trust estate, and the unit holders thereof. * * *

"That it is not true that said trustees have fixed the amount of their compensation as such trustees by having fixed the salary of the president, Hooper C. Dunbar, one of the trustees, at $350.00 per month, and the salary of the secretary-treasurer, C. C. Horton, one of the trustees, at first at $350.00 per month and thereafter at $500.00 per month, and the salary of the third trustee, G. B. Morris, as vice-president, at $100.00 per month, but it is true that said salaries of the president, Hooper C. Dunbar, at $350.00 per month, and the salary of the secretary-treasurer, C. C. Horton, at first at $350.00

per month and thereafter at $500.00 per month, and the salary of the third trustee, G. B. Morris, as vice-president, at $100.00 per month, were fixed in such amounts among the trustees alone for extraordinary services rendered said trust as such officers as aforesaid, and in equalizing their total compensation and the drawing thereof as between themselves, and it is true that the fixing of said amounts did not fix and were not intended to fix the amount to be drawn by said trustees in full of their compensation as such trustees.

"That it is true that said trustees, under the terms and provisions of said declaration of trust and the amendments thereto, were and are entitled to pay and at all times during the life of said trust did pay to themselves as trustees, and may continue to pay to themselves as trustees, such compensation as they and they alone, having due regard to the services by them rendered as such trustees, should deem reasonable for the services so rendered and to be rendered to said trust estate, said Bell View Oil Syndicate and the unit holders thereof, provided said total withdrawal of trustees' compensation and office expense, officers' salaries and all overhead expenses, as hereinafter defined, did not, do not, and will not in the future exceed in the aggregate 10 per cent of all moneys of Bell View Oil Syndicate and said trust estate received by such trustees."

It is apparent from the findings that the court adopted the theory set forth in respondents' complaint, that they were entitled to take as compensation all that remained of 10 per cent. of the gross income after paying other overhead expenses. It appears from the respondents' testimony that it was no mere coincidence that their idea of the value of their services corresponded exactly with the available balance of this fund. Horton testified: "We employed the interpretation that we were entitled to draw or entitled to use for overhead expenses, including our compensation, 10 per cent of all moneys received; no exceptions." Dunbar testified that the salaries were taken as a preferential "before there would be any trustee compensation," that they considered these salaries a preferential salary "on detail work, as distinguished from executive or trustee activity." He further testified: "The trustees made a withdrawal upon the basis of considering 10 per cent of what had been received, less all overhead expenses * * * there was available a certain amount for compensation." "In exercising our discretion we took into consideration, primarily, that it was available; and secondarily, that we had absolutely earned it, or we would not have considered taking it; that it was coming to us for the services we had rendered * * * the clause in the indenture providing if we had any income we could take up to ten per cent of it and set it aside and pay all overhead expenses out of it, and then draw from the remainder what we deemed reasonable for our services." "I figured that this was a deal of all that I could produce. If I could increase the income of the trust, I could increase my own income in direct proportion—the more income I could make for the trust, the more income would be available to me as long as it was reasonable, as I considered it reasonable." "We never made any withdrawal or consent to any withdrawal of salary by any of the other trustees without the understanding or belief that we were entitled to the balance of the 10 per cent regardless of the services that had been rendered in the past." In response to a question from the court as to whether he would consider himself entitled to share in withdrawals by the other trustees in the event he had been in Europe for a year and had performed no services at all for the trust, Dunbar replied that he would feel that such withdrawals belonged to the board of trustees provided they deemed it reasonable and whether the other trustees retained it all or gave him a portion of it was a matter of arrangement between themselves. In response to a question from the court as to the basis on which the trustees fixed their compensation Morris testified: "By first determining the amount that was available, setting aside 10 per cent of all of the overhead items and we adjusted the balance between ourselves with a certain amount to Mr. Dunbar and later another amount to myself. Then the balance was treated as compensation." He further testified that when this balance was ascertained they deemed it reasonable, and that "I felt it was more or less like a commission basis that the part of the 10 per cent that we were entitled to that we had earned that under the contract, under the trust." When asked whether, if he had been in Europe for a year and had rendered no service at all and on his return found there was $30,000 in this fund, he would have felt entitled to one-third of it, he replied: "I would consider that the other two trustees were entitled to the full amount and if they wanted to make an adjustment with me they could do so."

[6] It seems apparent that the case was tried upon the theory that these three trustees were entitled to take as compensation whatever remained of the 10 per cent. after paying other overhead expenses, and that this theory was adopted by the trial court. While the court made an incidental finding that the amounts taken as compensation did not exceed the reasonable value of the services rendered, we find no evidence to support that finding. While there was some evidence as to the amount of service rendered by the trustees and that they deemed the amount taken as reasonable in view of their services, no attempt was made to show the exact amount of time put in by the trustees and no evidence at all to show the reasonable value of the services actually rendered.

[7] In our opinion, the interpretation given to the trust agreement by the respondents and the trial court cannot be sustained. The trustees had no contractual right to all that remained of the 10 per cent. after paying other overhead expenses. While they were given the right to fix their compensation, subject to the limitation that all overhead expense should not exceed 10 per cent., the entire matter was subject to the general rules of equity and the compensation fixed must have been reasonable and governed in amount by the value of the services rendered.

[8] The trust agreement provided that the trustees should *elect* certain officers from among their number, that they might *appoint* other officers, and that they might fix the compensation of the appointed officers and likewise fix their own compensation. No power was given to fix a compensation for themselves as *elected* officers apart from their general services as trustees. We find no justification in the terms of the trust agreement for the taking of a double salary or compensation, one for detail work as an elected officer and the other for general executive services as a trustee. The trustees fixed their salaries as between themselves in proportion to the time each was giving to the work of the trust. In so doing they were carrying out the power given them to fix their own compensation. When a salary is paid for full-time service, such service certainly cannot be said to have been considered as having a reasonable value in excess of the amount fixed. Whether such a salary called for full time or only part time service it governed during the time it prevailed, subject only to being reduced by a court if it was unreasonable. Having thus fixed their compensation, these trustees were without power to withdraw additional amounts, under a theory of contractual right, during the time such salaries were fixed and paid, as to each trustee. Assuming that two of the trustees are entitled to some compensation during the time when they received no salary, the amount and value of the services rendered by them during such periods should be gone into before such compensation is fixed by a court of equity. In our opinion, this case should be retried and the respondents required to return to the trust estate the amounts found to have been wrongfully taken as compensation after a trial in which that matter is adequately presented and considered, and after fixing a reasonable compensation for any trustee covering any period during which the value of his services has not been fixed.

[9] The last point raised is that the respondent trustees were guilty of such fraud in settling a prior action brought against them as necessitates their removal. An action was brought against the respondents by one Penn, raising most of the claims which are involved in the present action. That action was tried, and the judge entered a minute order finding in favor of the trustees on all points except with respect to the matter of the compensation taken by them. On that point he found against them and ordered that judgment be entered against them in the sum of $247,500. Before findings were made and formal judgment entered the attorneys for all parties to that action entered into a compromise agreement under which that action was dismissed. These three trustees agreed to pay $25,000 to Penn's attorneys for attorney fees and costs, some $6,000 of which was paid by the trustees personally, the rest to be paid after a successful termination of this action. It was further agreed that the trustees would bring an action for declaratory relief, raising the question of compensation and all other claims that had been made against them by any of the unit holders, and for the purpose of obtaining an adjudication as to the meaning of the trust agreement on all disputed points. This action followed immediately. The former judgment had not become final and, in any event, applied only to the parties thereto and left unsettled the claims of many other unit holders. There is much to be said in favor of having the entire controversy between the various parties settled in one action in an orderly man-

ner. This plan having been agreed upon, and at once carried into execution, it does not conclusively appear that the trustees were actuated by fraudulent motives. After a full hearing on this point, the trial court found in favor of the respondents and we see no reason for setting aside that finding.

The judgment is reversed, and the cause remanded for a new trial and for further action not inconsistent with the views herein expressed.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 560

PEOPLE v. ANNINO.

Cr. 1868.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1936.

1. Criminal law ⇐1182

Motion to affirm judgment of conviction could be granted pro forma where, after filing notice of appeal and written statement of ground thereof, nothing was done in furtherance of appeal, and no appearance was made when appeal came for hearing.

2. Criminal law ⇐274

Trial court has wide discretion in passing on motion to withdraw plea of guilty.

3. Criminal law ⇐274

Denial of motion to withdraw plea of guilty to count charging rape on ground that plea was entered through misunderstanding *held* not abuse of discretion where accused's former counsel testified that he had fully explained to accused that count charging contribution to delinquency of minor would be dismissed only upon accused's plea of guilty to count charging rape.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Salvador Annino was convicted of rape, and he appeals.

Affirmed.

Victor Wells, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

[1] The defendant appealed from a judgment of conviction of rape, after having pleaded guilty to the charge; but to all intents and purposes the appeal has been abandoned. After filing the notice of appeal and the written statement of the grounds thereof, nothing was done in furtherance of the appeal; no brief was filed nor was any appearance made in behalf of the defendant when the appeal came on for oral argument before this court. The Attorney General moved, therefore, that the judgment be affirmed, and, doubtless, under the rule, was entitled to have the motion granted pro forma. Nevertheless, we have examined the record, and after having done so find the appeal to be without merit.

The following are the facts: Defendant was charged by an information containing two counts with the commission of the crimes of rape and contributing to the delinquency of a minor. At the arraignment he was represented by counsel of his own selection, and after having been granted a continuance of one week, entered a plea of not guilty to each count. The trial of the cause was set by consent for a week later, and at the beginning thereof defendant, being personally present with his counsel, withdrew his plea of not guilty to the first count and entered a plea of guilty thereto; whereupon, on motion of the district attorney, the second count was ordered dismissed. A motion for probation was then made in behalf of defendant, and pronouncement of judgment of sentence was postponed for approximately a month. In the meantime defendant secured other counsel, and when the cause again came before the court, counsel then representing him presented a motion in his behalf asking leave to withdraw his plea of guilty to the first count and to enter a plea of not guilty thereto. The ground of the motion was that defendant entered said plea of guilty to the first count through a misunderstanding on his part; that he intended to plead guilty to the second count. In opposition to appellant's claim, the attor-

ney representing him at the time he entered said plea of guilty was called as a witness by the state, and according to his testimony there was no misunderstanding whatever about the matter; whereupon defendant's motion for leave to withdraw his plea was denied and judgment of sentence was pronounced. In so testifying said attorney stated that the defendant first made a proposition to the district attorney that he would plead guilty to the charge of contributing to the delinquency of a minor (which involved a lesser penalty) if the charge of rape were dismissed; that the district attorney rejected the proposition, but agreed to dismiss the charge embodied in the second count if defendant would plead guilty to the charge of rape. Continuing, said attorney testified that he fully explained all of this to the defendant, and that the defendant thereupon consented to the proposal so made by the district attorney and entered his plea accordingly.

[2, 3] It is well settled that in passing on a defendant's motion to withdraw a plea of guilty, the trial court is vested with the exercise of a wide discretionary power; and it is evident from the foregoing testimony that there was no abuse in the exercise of such discretionary power in the present case.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



11 Cal.App.2d 662

STATE v. ARRATA et al.

Civ. 5471.

District Court of Appeal, Third District, California.

Feb. 8, 1936.

Hearing Denied by Supreme Court April 6, 1936.

1. Evidence ⇐594

Uncontradicted testimony of witness must not be accepted as proof of the fact where testimony is so inherently improbable as to induce court or jury to disregard testimony, even in absence of any direct conflicting testimony.

2. Appeal and error ⇐1008(1)

Appellate court cannot disturb trial court's conclusion unless it clearly appears that trial court entirely misconceived evidence.

3. Escheat ⇐6

Evidence *held* to warrant judgment escheating gold bullion to state, which was found under floor of bank more than five years after it had been left by alleged owner with bank police officer for safekeeping (St.1925, p. 162, as amended; St.1929, p. 337, § 4b).

4. Escheat ⇐6

Claimant of property sought to be escheated has burden to prove pro tanto interest therein, or some right superior to state's residual title (St.1925, p. 162, as amended; St.1929, p. 337, § 4b).

5. Appeal and error ⇐1071(6)

Failure to make findings, in action to escheat gold bullion, on denials of answer and affirmative matter therein *held* not prejudicial, where trial court's ultimate holding was adverse to claimant (St.1925, p. 162, as amended; St.1929, p. 337, § 4b).

6. Appeal and error ⇐1071(6)

Where findings indicate trial court's ultimate holding, and it clearly appears that if court had made findings requested by appellant findings would have been adverse to appellant, it is not error to refuse requested findings.

7. Appeal and error ⇐1071(6)

Trial court's failure to make findings which appellant considered essential to recovery, by rendering judgment for appellees, must be regarded on appeal as trial court's conclusion that evidence was insufficient to justify requested findings.

8. Statutes ⇐114(7)

Statute providing for regulation of persons engaged in business of buying and selling silver or gold bullion *held* not invalid as failing to embrace subject-matter of amendment in original title of statute (St.1925, p. 162; St.1929, p. 336).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State against Castro Arrata and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Wallace Shephard and Robert C. Fleming, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Albert F. Zangerle, and Neal Chalmers, Deputy Attys. Gen., for the State.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

The state of California, under an appropriate statute (St.1925, c. 70, p. 162, as amended, known as the High Grade Act) brought this action against appellant and others to escheat certain gold bullion.

The complaint alleges that the state of California has held unclaimed for a period of five years 202.10 ounces of gold bullion; that defendants assert some claim thereto but the same is without right, and pray that the bullion be declared to have escheated to the state.

From the evidence, it appears that Castro Arrata took this bullion, in the form of a bar, to the Bank of Italy for the purpose of selling the same. He was informed the bank was not purchasing gold, and he then asked Charles P. Fitzgerald, a special police officer of the bank and a friend of his, to care for this gold. Fitzgerald first attempted to place the same in his safe deposit box but on account of its size or shape it could not be so deposited, so he put it in his steel locker, where it remained for about three weeks. Fitzgerald was then about to go on his annual vacation, and not wanting to leave the gold in the locker, he attempted to return it to Arrata. He could not find Arrata on the night of his departure, however, so he delivered the bar to Joe Schardin, who was also a special officer at another branch of the Bank of Italy, a few blocks away. Schardin agreed to take care of the bullion, and the two men, about 1 o'clock in the morning, went to the bank where Schardin was employed, and concealed the bar under the floor in the basement of the bank. Here the gold remained until found by some of the officers of the bank, who reporter the matter to the state department of natural resources, who thereafter took possession under the provisions of section 4b of the High Grade Act, as found in chapter 183, page 337, Statutes of 1929. There is some conflict in the record, as but one bar of bullion was placed under the floor by Schardin and Fitzgerald, but when subsequently recovered, two bars were found. It seems, however, although not clearly established, that some one had remelted the gold, changing it from one bar to two smaller bars.

No demand was made on the state by any one for the possession or return of this bullion, and after it had been held the requisite five years, the state brought the present action to declare the same escheated.

Upon the trial, the court found that on or about January 2, 1930, the bullion had been seized by the state, and five years had elapsed since the state came into possession of the gold, and during that time the same remained unclaimed, and that Arrata, the only defendant who appeared in the action, had no right, title, or interest in said bar or any part thereof, and entered a judgment escheating the property to the state.

[1, 2] Appellant claims the evidence is insufficient to sustain this finding. It is true that Mr. Arrata testified he purchased the bullion in good faith and claimed to be the owner thereof, and it is also true that the state did not produce any one who claimed any title or interest therein. It is also the general rule that the uncontradicted testimony of a witness to a fact may not be disregarded, but must be accepted as proof of the fact, but as said in the case of Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733, 734, 851, 35 L.Ed. 501, referring to the many exceptions to this general rule, that "there may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony." So in this case it was the duty and province of the trial judge to hear the evidence and to give to it such weight and credit as it should be entitled, and an appellate court cannot disturb such a conclusion unless it clearly appears that the trial court misconceived the evidence entirely.

We are familiar with the usual instructions given a jury that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, and that a witness willfully false in one part of his testimony is to be distrusted in others, even to the rejection of all thereof. The same rules apply to a court sitting without a jury. Here the trial judge, a jurist of great ability and long years of experience, characterized the testimony adduced in behalf of the claimant as disingenious and incredible. Let us examine briefly the testimony in the case.

Arrata testified he purchased the gold in the form of a bar from some man whom he did not know, who said he lived in Jackson. He paid him an amount that he was

not able to state accurately, but thought it was $4,000, which he paid in cash, taking no receipt or bill of sale therefor, and without having the gold tested or assayed. He took the bullion to the bank and intrusted it to Fitzgerald, who placed it in his private locker, who in turn, without notifying Arrata, gave it to Schardin for safekeeping, and he concealed it under some boards in the basement of another bank, where it remained until uncovered by officers of the bank. It is also to be remembered that the parties were dealing with a commodity having a fixed market value and a very ready sale in well-known establishments.

The witness testified that he never inquired of Fitzgerald where the bullion was after he had delivered it to him, during the interval of several weeks. The witness was unable to give any definite dates when any of these transactions took place, nor was he able to give any adequate description of the man from whom he claimed to have acquired the bullion.

Mr. Fitzgerald testified as to receiving the bullion and placing it in the locker, and delivering it to Schardin for safekeeping. He testified that while he had the gold in his possession Mr. Arrata and two others came to the bank and took the gold to an assay office. Mr. Arrata denied ever having seen the gold after having delivered it to Fitzgerald. Fitzgerald was asked upon cross-examination, the following question: "Q. Did you ever have a conversation with Mr. Kay just prior to Mr. Kay's arrival there at the bank in which you told him that Castro had some 'hot' gold and wanted to sell it?" To which he answered, "I don't know—I don't think I did." He did admit, however, telling Mr. Kay that Castro had some gold which he wanted to sell. Kay was not a licensed dealer in gold, but a musician in a night club in a neighboring community.

It also appeared from the evidence that Schardin had died some five years prior to the date of trial.

Mr. John F. Bongard, an inspector for the state division of mines, testified that he received the two bars of gold from the officials of the bank and at that time attempted to make some investigation in regard thereto. He interviewed Schardin, who first stated that the gold had been given to him by a miner friend of his to hold, but he could not tell where the man was or anything about it. He finally admitted that the gold had been given to him by Mr. Fitzgerald. Upon interviewing Fitzgerald, he at first denied any knowledge of the gold, but later admitted that he had received it from Mr. Arrata. When the officers called upon Mr. Arrata at his hotel he at first denied any knowledge of the gold, but after about two hours of questioning finally admitted he had bought the gold from a man by the name of Porres in Jackson. The officers then went to Jackson where they interviewed Porres, but Porres denied that he had ever sold any gold to Arrata, and when Arrata confronted Porres he failed to identify him as the man from who he had purchased the gold. It was on this evidence that the trial judge based his finding that Arrata had no right, title, or interest in the said bars of gold bullion, or any part thereof.

[3] It is the contention of appellant that even if Arrata failed to prove ownership he had established some right or interest therein. However, the court was fully justified, on the evidence adduced, in finding as it did.

[4] It is true the statute placed upon the claimant the burden of proving ownership or some right or interest therein. The state contends, and we think correctly, that the right or interest referred to is a pro tanto interest, such as ownership in common or a valid lien, or, in other words, a claim in the ownership or a share in the property itself. The very purpose of the act is to return the bullion to the real owner and not to one who has acquired a mere possessory title or interest. It is to be recalled also that this is an action by the state in its sovereign capacity which holds a residual title to all property within its boundaries, and a claimant must establish some right in the property superior to that of the state.

[5-7] Appellant further urges that the court erred in failing to find on the denials of the answer and the material affirmative matter set up therein. These matters were that appellant was a bona fide purchaser of the gold, that he had possession of the same prior to seizure, that he had claimed ownership prior to and during the time the same was held by the state, that the gold was not in fact stolen, and that the officers had no reasonable grounds to believe that it had been.

While it is true that the court did not make specific findings in regard to the foregoing issues, the findings as made indicate the holding of the court on the ultimate

fact, and where it clearly appears that if the court had made findings, and such findings would have been adverse to the contention of appellant, it is not error to fail to so find. "Its failure to find from the evidence the facts deemed by appellant to be essential to a recovery by him * * * by rendering judgment in favor of the defendants, must be regarded as its own conclusion that the evidence was insufficient to justify such findings as would authorize a decision in favor of plaintiff." Tower v. Wilson, 45 Cal.App. 123, 188 P. 87, 91.

To the same effect is Peak v. Republic Truck Sales Corporation, 194 Cal. 782, 230 P. 948, 951, where there was a finding, "no sum due, owing, or unpaid to the plaintiff from the defendants," and the court held it was not necessary to find relative to all the specific transactions in the premises. In 24 Cal.Jur. 944, will be found many authorities in support of this principle.

[8] Appellant also contends that section 4b of the act referred to is unconstitutional in that the subject-matter of 4b is not embraced within the original title of the act. We believe an examination of the title of the act and the amendment thereto show that appellant cannot be sustained in this contention. The original act is entitled, "An act to provide for the regulation, control and licensing of any person, * * * engaging in the business of * * * purchasing, or receiving for sale, * * * silver or gold bullion, nuggets or specimens; to provide rules and regulations therefor; and to provide penalties for the violation of the provisions of this act." St. 1925, p. 162.

The amendment provides, "to add a new section to said act to be numbered 4b relating to the enforcement thereof and the escheat of ores seized thereunder." St. 1929, p. 336. The amendment is clearly germane to the subject matter referred to in the title.

In view of the record and principles of law applicable to the issues, and the application of the well-recognized rule that this court will be bound by the findings of the trial court, if based upon competent evidence, we are of the opinion that the judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.

11 Cal.App.2d 488

HOMESTAKE MINING CO. et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10109.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1936.

Hearing Denied by Supreme Court March 26, 1936.

1. Appeal and error ⇐478

Averment that appeal was taken in good faith and that appellants would lose fruits of reversal, in absence of supersedeas, *held* insufficient to authorize granting of supersedeas (Code Civ.Proc. § 949).

2. Appeal and error ⇐479(2)

Supersedeas is not writ of right, but one resting in appellate court's discretion, and is issued in aid of appellate jurisdiction (Const. art. 6, §§ 4, 4b).

3. Appeal and error ⇐478

Party seeking supersedeas must establish necessity therefor and that substantial questions will be presented on appeal.

4. Mandamus ⇐187(6)

Party seeking writ of supersedeas to restrain enforcement of mandate permitting inspection of corporate records must establish that some special reason exists, different from ordinary suit to compel inspection, why judgment of trial court should be stayed pending appeal (Civ.Code, § 355; Code Civ. Proc. § 949; Const. art. 6, §§ 4, 4b).

5. Mandamus ⇐163

In mandamus proceeding to enforce stockholder's right to inspect corporate records, corporation *held* not entitled as matter of right to answer over after demurrer had been overruled (Civ.Code, § 355).

6. Evidence ⇐82

Court will presume that another court, acting within its jurisdiction, has acted with judicial discretion, and party claiming abuse of discretion must rebut such presumption.

7. Mandamus ⇐163

In mandamus proceeding to enforce stockholder's right to inspect corporate records, entry of judgment on demurrer *held* not abuse of discretion, where time within which to file answer had not been reserved, requested, or granted (Civ.Code, § 355).

8. Mandamus ⇐154(4)

Failure of stockholder, seeking to enforce right to inspect corporate records, to allege that his rights as stockholder were likely to be seriously prejudiced, that stockholder was not on fishing expedition, and

that bona fide dispute between parties existed, *held* not ground for denying writ of mandate, since stockholder need not anticipate corporation's affirmative defenses (Civ.Code, § 355; Code Civ.Proc. § 1085).

9. Mandamus ⇐154(4)

Where stockholder pleaded four sufficient purposes showing why he desired to inspect corporate records, failure to allege that any one of such purposes was reasonably related to his interests as stockholder *held* not ground for denying writ of mandate (Civ. Code, § 355; Code Civ.Proc. § 1085).

10. Mandamus ⇐187(6)

Corporation appealing from writ of mandate permitting stockholder to inspect corporate records *held* not shown to be entitled to writ of supersedeas (Civ.Code, § 355; Code Civ.Proc. § 949; Const. art. 6, §§ 4, 4b).

Proceeding by the Homestake Mining Company and another against the Superior Court of the City and County of San Francisco and others for a writ of supersedeas to restrain enforcement of a mandate permitting the inspection of the petitioner's corporate records.

Application denied and preliminary writ discharged.

Garret W. McEnerney, of San Francisco, for petitioners.

Ackerman, Wayland & Mathews, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner asks for a writ of supersedeas to restrain the enforcement of a mandate of the superior court permitting the inspection of its corporate records.

The proceeding below was instituted by a shareholder after demand and refusal, and followed the procedure outlined in section 355 of the Civil Code. An alternative writ of mandamus was issued when the complaint was filed, and on the return day the corporation appeared by demurrer alone. The demurrer was argued and submitted on briefs, and about 30 days thereafter an order was entered overruling the demurrer and directing the writ to issue. This order read in part: "And it further appearing that no time within which to file an answer to said petition for writ of mandate was reserved or requested by said defendants * * * that no time was or has been granted to said defendants * * * within which to answer * * * and that said defendants have failed to show cause why the acts and things required of them and each of them by said alternative writ of mandate should not be done." A peremptory writ was thereupon issued, from which the defendants have given notice of their appeal.

[1] In this application for supersedeas, the petitioners rest upon the statement that they are appealing in good faith and that they are entitled to the writ so that they may enjoy the fruits of their appeal if the judgment is reversed. This falls far short of what petitioners must show before a supersedeas can issue. Section 949 of the Code of Civil Procedure provides that an appeal "does not stay proceedings, without a writ of supersedeas * * * where it orders a corporation * * * to give to a person adjudged to be a * * stockholder * * * a reasonable opportunity to inspect or take copies of such books." The general rule applicable to other proceedings in mandamus is that an appeal from the judgment stays the mandate until the proceedings on appeal are terminated. There is thus found in this section of the Code a plain declaration of the Legislature that proceedings of this character are summary, and that the right of inspection should not be suspended during the long process of an appeal except for some special reason. Hence it is not sufficient to say that the appeal is taken in good faith or that, if no stay is granted, the appellants would lose the fruits of a reversal. This could be said of every appeal that is taken from a judgment of that character, and if the appellate courts were required to issue a writ of supersedeas on such a showing, the whole purpose of section 949 would be defeated.

[2-4] Supersedeas is not a writ of right, but is one resting in the discretion of the appellate court. 23 Cal.Jur. pp. 984, 985; Kerr v. Kerr, 126 Cal.App. 160, 14 P.(2d) 316; Bardwell v. Turner, 219 Cal. 228, 25 P.(2d) 978. It is issued in aid of the appellate jurisdiction, and finds sanction in sections 4 and 4b of article 6 of the Constitution. Neither the Code nor the rules of court provides any procedure for the application, hearing, or granting of the writ, and not much light is found in the decisions. It may be accepted, however, as a general principle that, since the only power to issue the writ is when it is nec-

essary to aid the appellate jurisdiction of the court, it is incumbent upon him who seeks it to carry the burden of showing that necessity. Furthermore, since the issuance of the writ is discretionary, it is incumbent upon the applicant here to show that substantial questions will be presented upon the appeal (Bardwell v. Turner, 219 Cal. 228, 25 P.(2d) 978); that some special reason exists, differing from the ordinary suit to compel an inspection of the records, why the judgment of the trial court should be stayed pending the appeal (McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 263 P. 338); and that his is an exceptional case presenting exceptional circumstances which would justify the appellate court in setting aside the provisions of section 949 (People v. Piazza, 59 Cal.App. 43, 44, 209 P. 1017).

[5] The position assumed by the petitioners here is that "as a matter of right" they were entitled to answer over after their demurrer was overruled, and therefore, "as a matter of right" they are entitled to a supersedeas. Petitioners are wrong in both instances. There is no absolute right to answer over in any civil case. Section 472 of the Code of Civil Procedure provides: "A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed." The special provisions of the Code applicable to mandamus are found in sections 1084 to 1097, inclusive. Section 1109 provides that "except as otherwise provided in this title" the provisions of part 2 of the Code shall constitute the rules of practice in these special proceedings. Section 1088 provides two methods by which a writ of mandate may be granted—one following a hearing in response to an order to show cause based upon the petition and an alternative writ, the other following a hearing upon motion of the petitioner in response to a notice of motion based upon the petition filed. Section 1089 provides that, on the return day or the day on which the application is noticed, the defendant "may answer the petition under oath" in the same manner as an answer to the complaint. Section 1090 permits the court to submit to a jury issues of fact essential to the determination when such issues are raised by the answer. Section 1094 provides that: "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law," the court must proceed to hear the argument of the case.

With these statutory provisions in mind, a reference to the decisions discloses that there has been no misconception of their meaning. Section 472 of the Code and section 67 of the Practice Act which preceded it, have been uniformly held to confer upon the trial court discretion to grant or deny leave to answer after a demurrer is overruled. In the early case of Thornton v. Borland, 12 Cal. 438, Justice Field laid down the rule as follows: "The Court, as a matter of course, regarded the demurrer as frivolous, and overruled it. Proof was then made of the claim of the plaintiff, and judgment rendered in his favor; and the objection made by the appellant is, that leave was not given to put in an answer. The reply to the objection is found in the statute, which provides that in overruling a demurrer to the complaint, 'the Court may, upon such terms as shall be just, and upon payment of costs, allow the defendant to file an answer.' (Practice Act, § 67, as amended in 1854). The allowance rests in the discretion of the Court below, subject to review, of course, in case of its arbitrary or unreasonable exercise. The exercise of the power must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. The party whose demurrer is overruled, ought to be required to obtain leave to answer, to satisfy the Court that he has a substantial defense on the merits to the action. In the case at bar, nothing of the kind was done; no application for leave to answer was made, and no possession of any meritorious defense was asserted." It would serve no purpose to cite the numerous cases which have followed this rule. It is sufficient to say that it has been accepted and approved by all the decisions which have come to our attention.

[6] The rule of these cases is conceded by petitioners, but their answer is that, when leave to answer is denied, an abuse of discretion must be "presumed." This theory is not supported by any statute or rule of decision. To the contrary, the courts will always presume that another court acting within its jurisdiction has acted with judicial discretion. If the claim is made that such discretion has been abused, some showing must be made to rebut that

presumption. This must be so because we are required to give to every valid act of the Legislature the purpose and meaning which the Legislature intended. It must be manifest that, when the Legislature gave to the trial court power to grant leave to answer over under such terms as it may impose, the Legislature contemplated that cases might arise when such leave might be denied. There is no real difference between such a situation and one arising when leave is asked to amend a complaint or answer. Cases could be cited holding that denial of such leave was, under the facts of the particular case, an abuse of discretion, but in such a case an appellate court would never presume that the denial was an abuse of discretion.

[7] That brings us to the vital point raised in this proceeding. It may be briefly stated as follows: That sound judicial action rests upon facts and circumstances and not upon theories or conjectures. We are asked to declare that the trial court abused its discretion in entering the judgment upon the demurrer, and this request is based upon the mere conjecture that the defendants had a meritorious defense which they desired to offer. There is not a word in the petition for supersedeas which tenders that issue. Full opportunity was given at the hearing of the application to make some showing of the essential elements necessary before this writ could issue, but petitioners have made no effort to make such showing at any time. The only language in the petition which bears on the subject is the statement that, if defendants had been allowed to answer in the court below, it was their "desire and purpose * * * to tender all defenses that were available to them." This falls far short of what our common practice knows as a declaration of merits. All the defenses available may have been nothing more than questions of law which section 1094 provides may be raised in the answer. If any presumptions are to be indulged in here, we must presume, in giving verity to the judgment, that such fact was made known to the trial court before the judgment was entered. But it is not to be presumed that, if the defendants had made known to the trial court that they had a meritorious defense, leave to raise the issue would not have been granted. If they had alleged in their application filed herein, or had shown by affidavit or otherwise, that they had a meritorious defense, their standing might be different here also.

This feature aptly illustrates the whole topic of the foregoing discussion. If at the hearing in the court below the defendant had tendered a proposed answer which admitted or failed to deny the allegations of fact in the complaint which would entitle the plaintiff to an inspection of the books under section 355 of the Civil Code, and which set up defenses which raised questions of law alone or which were irrelevant to the issues, no court would be justified in holding that the trial court had abused its discretion in refusing leave to file such answer. On the other hand, if the defendants had shown that they had a meritorious defense, it is fair to assume that the trial court would have given them leave to answer and to defend upon the merits. It is not a sufficient answer to this statement that the judgment was entered within a few days after the demurrer was overruled. Though the defendants procured a stay of execution, they did not request leave to answer, but speedily filed a notice of appeal which took the whole matter out of the jurisdiction of the trial court.

[8] We have refrained as far as possible from saying anything herein which might be treated as determinative of the issues to be raised on the appeal from judgment. But, bearing in mind the rule of the cases heretofore cited, it becomes necessary to examine the proceedings for the purpose of determining whether the appeal presents "substantial questions" or has "possibilities." This we do to the same extent as we examine a record upon motion to dismiss an appeal made under subdivision 3 of rule V. With these limitations in mind, we have examined the complaint and demurrer in the proceeding below to determine whether the appeal on its face presents "substantial" or "debatable" questions. The complaint pleads all the facts referred to in section 355 of the Civil Code as essential to an assertion of the right to inspect the corporate books—the incorporation of the defendant, the issuance of shares of stock, that plaintiff is a shareholder, that demand was made upon the proper officers and refused. It then pleaded four reasons why plaintiff desired to inspect the books: The disparity in value between the published annual report of the corporation and the market value or price of the outstanding stock; to determine whether the outstanding stock was held by a few shareholders who dictated the accounting policies; to determine whether the relation of the directors was against the in-

terests of the minority stockholders; and to ascertain the present value of the stock owned by the plaintiff. The demurrer was both general and special. Though the briefs filed in the trial court are not before us, the respondents herein state, and their statement is not challenged, that this demurrer raised four points: Failure to allege that plaintiff's rights as a shareholder were likely to be seriously prejudiced; failure to allege that the application does not have the marks of a fishing expedition; failure to allege a bona fide dispute between the parties; and failure to allege that the purposes set forth were "reasonably related to his interests as a shareholder."

Manifestly none of the first three grounds of the demurrer presents a debatable question. Section 1085 of the Code of Civil Procedure declares that the writ of mandate shall issue to compel a corporation to perform "an act which the law specially enjoins." Section 355 of the Civil Code specially enjoins a corporation to permit a shareholder to inspect its books when the conditions mentioned in that section exist. There is nothing in the section which provides that this right may be denied unless a bona fide dispute has arisen, or unless the rights of the shareholder have been seriously prejudiced, or if the shareholder is on a "fishing expedition." Cases have been written holding that the court may, in the exercise of its discretion, deny a writ of mandate if it finds that the desired inspection is but a "fishing expedition," but we are aware of no case holding that the shareholder must anticipate and plead the affirmative defenses of the corporation.

[9] The last ground assigned is of even less merit. The complaint pleaded four purposes showing why the shareholder desired to inspect the books. It did not plead that any one of these purposes was "reasonably related to his interests as a shareholder." Two of the reasons alleged have been held sufficient as reasonably related to such interests. Hartman v. Bandini Petroleum Co., 107 Cal.App. 659, 290 P. 900. Any one of the four would have been sufficient basis for the demand. Hence the additional allegation that any one of these alleged purposes was "reasonably" related to the shareholder's interests would have been but a conclusion of law.

[10] For these reasons we are compelled to conclude that the demurrer does not present substantial or debatable questions and that it appears on the face of the record to have been interposed solely for the purpose of delaying the proceedings. Entertaining these views, it would be an abuse of discretion to suspend execution of the judgment pending determination of the appeal.

The application is denied, and the preliminary writ is discharged.

We concur: STURTEVANT, J.; SPENCE, J.



11 Cal.App.2d 643

WILSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10774.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1936.

Judgment ⇐17(9), 101(1)

Where, in action against defunct corporation, summons or complaint did not show that director of such corporation was served as trustee or that action was against other trustees of corporation, as required by statute, complainant was not entitled to entry of default of such defendants (Code Civ. Proc. § 411, subd. 6).

Original petition for writ of mandate by H. J. Wilson against the Superior Court in and for Los Angeles County, and Hon. Parker Wood, Judge presiding in Department 7 thereof.

Writ denied.

Harmel L. Pratt, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is a petition for a writ of mandate against the superior court, Judge Parker Wood presiding, to require it to enter the default of certain defendants. Section 411 of the Code of Civil Procedure provides how summons must be served, and the petitioner relies upon subdivision 6 thereof, which reads as follows: "6. *Suit against corporation whose charter forfeit-*

ed. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members."

The petitioner alleged that the Beach Land Company, a corporation, was dissolved in the year 1925; that the board of directors of said corporation consisted of W. K. Barnard and six others, who became and still are trustees of the assets of the dissolved corporation; that the petitioner on the 6th day of August, 1935, commenced an action to quiet title to certain real property, the complaint being in the usual form for actions to quiet title; that the defendants against whom the petitioner seeks a default were named only by fictitious names, and that the defunct corporation was also so named; that on the same day W. K. Barnard, one of said trustees, was duly served with summons and complaint in Los Angeles county, and proper return was made of said service; that no appearance was made by the said Barnard or by any one of the seven trustees of the assets of the said defunct corporation; and that the court refused and still refuses to enter the default of the six trustees other than the said Barnard.

There was nothing in the summons which was served upon defendant Barnard nor in the copy of the complaint which was thereto attached which gave notice to him that he was being served as a trustee of the Beach Land Company, nor that the cause of action was against the other six trustees of the assets of that defunct corporation. For this reason we deny the writ.

We concur: WOOD, J.; GOULD, Justice, pro tem.

5 Cal.2d 205

POLLOCK v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 15309.

Supreme Court of California.

Jan. 23, 1936.

Rehearing Denied Feb. 20, 1936.

1. Master and servant ⇐416½

Industrial Accident Commission *held* to have jurisdiction to determine validity of payments made upon its award, notwithstanding judgment had not yet been entered on award (St.1917, p. 851, § 21 (a, c, d).

2. Master and servant ⇐416½

Statute providing that a "disability payment which shall be payable for one week in advance as wages" shall be paid to employee temporarily disabled by injury *held* not to mean that such payments or any award of Industrial Accident Commission shall constitute "wages," as used in statute authorizing payment of wages of a minor to such minor, in absence of contrary direction from guardian or parent (St.1917, p. 836, § 9 (b); Civ.Code, § 212).

[Ed. Note.—For other definitions of "Wages," see Words & Phrases.]

3. Master and servant ⇐416½

Payment of compensation award directly to minor employee *held* ineffectual to discharge employer's indebtedness created by award, in view of provision of Probate Code requiring payments in sums exceeding $250 to be made to guardian, and other provisions indicating policy to prevent minors from directly handling their own money (St.1917, pp. 841, 869, §§ 11, 57 (a), subd. 3; Probate Code, §§ 1060, 1430, 1510).

4. Master and servant ⇐416½

Industrial Accident Commission had authority to condition its order declaring payment of compensation award directly to minor employee ineffectual to discharge employer's indebtedness upon minor's return of building and loan certificates purchased by him with award money.

5. Infants ⇐46

One deals with infants at his peril.

In Bank.

Proceeding under the Workmen's Compensation Act by Saul Pollock, by Morris Pollock, his guardian ad litem, claimant, opposed by the Plumbing Sheet Metal Products Company, employer, and the Great American Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission denying a petition for an order to direct the insurance carrier to make payments on an award, claimant brings certiorari.

Order annulled, with directions.

Prior opinion, 42 P.(2d) 355.

Harry Sherr, of Los Angeles, for appellant.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent Industrial Accident Commission.

F. Britton McConnell, of Los Angeles, for respondent Great American Indemnity Co.

PER CURIAM.

In July of 1929, petitioner, Saul Pollock, was injured while working in the scope and course of his employment. At the time of his injury petitioner was 15 years of age. After a hearing duly had, respondent commission made an award in favor of petitioner in the sum of $1,937.19, payable in weekly installments of $20.83 each. The record of that proceeding indicates that respondent insurance carrier was represented by counsel, actively participated at the hearing, and contested the award. The record of that hearing indicates that, at the commencement of the proceeding before the commission, it, by order regularly made and acting pursuant to the terms of the Workmen's Compensation Act (St. 1917, p. 831, as amended), appointed one Sam Rosen as guardian ad litem for the minor. On the date of the award, February 21, 1930, there was due and owing to the injured employee the sum of $624.87. Although the insurance carrier had actual knowledge that a guardian had been appointed, it saw fit to make the check in that amount payable to the order of the minor. There is a dispute as to just what then occurred. Saul Pollock testified that the check was never delivered to him; that an employee of the respondent insurance carrier induced him to indorse the check, and to let her deposit the same in a building and loan association in his name; that such employee carried out all of the details pertaining to the opening of the account. There is other evidence in the record, principally that of the then attorney for Saul Pollock, and of the employee of the insurance company, that the check was delivered to Saul Pollock; that he requested that it be depos-

ited with the building and loan association; that he carried out the details of opening the account. Whatever the true facts may be, it is certain that this first check was indorsed by Saul and that an account was opened in his name in the building and loan association. As to all subsequent checks constituting the balance of the award, there is no dispute. These were made payable to the order of Saul Pollock, but were never delivered to him. They were delivered to the employee of the respondent insurance carrier above mentioned, who indorsed the same, and caused them to be deposited in Saul's account with the building and loan association. This was done upon the oral authorization of Saul. After several checks had been so deposited, the insurance company employee testified she secured a written authorization from Saul to indorse the checks, but this writing was apparently later destroyed. After the entire award had been paid, the building and loan association became insolvent; the testimony indicating that the account is worth but 37 cents on the dollar. Saul, still a minor, thereupon instituted the present proceeding before the commission, entitling the same "Petition to appoint new guardian ad litem and to enforce collection of award." In addition to requesting that Saul's father be substituted as guardian ad litem, the petition requests that it be determined that the deposit of the award with the building and loan association under the above-recited circumstances did not constitute payment of the award, and that the award should be paid to the new guardian ad litem. The petition states that Saul disaffirms any arrangement made by him with the insurance company. The commission, after a hearing, ordered Saul's father substituted as guardian ad litem in place of Sam Rosen, but denied petitioner any further relief. The order of the commission recites that, it appearing that the father of Saul as his new guardian ad litem "has not returned nor offered to return to the defendant carrier the two certificates issued by the Pacific States Savings and Loan Company as the successor in interest in the Fidelity Savings and Loan Association," the petition is denied. The new guardian ad litem thereupon petitioned for a rehearing, pointing out that at the hearing neither party had raised the issue as to the return of the passbooks, and also that he had been appointed guardian on the very day of the hearing and had had no opportunity to make a tender. The new guardian, in his petition for rehearing formally offered to return the passbooks to the insurance carrier. A rehearing was granted by the commission, and, after further consideration, the commission again entered its order denying any relief to Saul, whereupon this proceeding was instituted.

[1] The first question presented is whether the commission has any jurisdiction to determine the validity of payments made upon one of its awards. The District Court of Appeal, when this proceeding was before it for determination, held that the commission had no jurisdiction, and that the superior court was the proper tribunal to determine the validity of the payments. Upon this court granting a hearing, counsel for the insurance carrier concede that the commission had jurisdiction, but contend the payments were validly made. With this concession we are in accord. Section 21(a) of the Workmen's Compensation Act (Stats.1917, chap. 586, p. 831, as amended) provides that any party affected by an award of the commission may file a certified copy of the findings and award with the clerk of the superior court, and the clerk must thereupon enter judgment. Subdivision (c) of section 21 provides that the commission upon good cause appearing to it may stay execution of any judgment entered upon the award, or where it appears to the commission an award should be stayed, and a certified copy of the award has not been issued, the commission may withhold such certified copy with the same force and effect as a stay of execution. Subdivision (d) of section 21 provides that, when a judgment is satisfied in fact, otherwise than upon an execution, the commission, upon motion of either party, or of its own motion, may order the entry of satisfaction to be made, and upon the filing of such order with the clerk of the superior court the latter must enter satisfaction. It is obvious from these sections that the Legislature, acting well within the constitutional enabling provision, has invested the commission rather than the superior court with the power to determine whether in fact an award has been paid. In the instant case, if entry of the findings and award as a judgment had been first procured by the applicant, there would be no doubt that it would be for the commission rather than for the superior court to determine whether the award had

been paid. It seems clear and in accord with the purposes and intent of the act that the commission, in the circumstances of the instant case, has been invested with the power to consider the question presented as well before, as after, the applicant has procured entry of judgment on the award.

[2-4] We turn now to a consideration of the question as to whether the award has in fact been paid, and this turns upon whether the insurance carrier may legally pay an award to a minor employee. In discussing this point, we are not concerned with the validity of the arrangement made by Saul with the insurance carrier, but with the much broader question as to whether a debtor may lawfully discharge a debt due to a minor by payment directly to the minor. The respondent insurance carrier seeks to justify payment to the minor under section 212 of the Civil Code and under section 9(b) of the Workmen's Compensation Act (St. 1917, p. 836). Section 212 of the Civil Code authorizes an employer to pay "wages of a minor employed in service" to such minor where the guardian or parent of the minor has not notified the employer that such wages should be paid to him. Section 9(b) of the act provides that, where an injury causes temporary disability, a "disability payment which shall be payable for one week in advance as wages" shall be paid to the employee. The expression "as wages" found in section 9(b) does not mean that such disability payments, or any award of the commission, shall constitute wages, or that such payments shall constitute "wages" as that term is used in section 212 of the Civil Code. Obviously an award for injury under the act is not paid to the employee as wages, but as compensation for the injury.

There is no provision of the Workmen's Compensation Act directly requiring that awards to minor employees be paid to the guardian or parent of the employee. Section 57(a), subd. 3 (St. 1917, p. 869), provides that the commission has full power and authority to appoint a trustee or guardian ad litem to appear for and represent any minor and to require a bond if necessary. Section 11 of the act (St.1917, p. 841) deals with the statute of limitations, and subdivision d of that section provides that if the injured employee is under 21 when injured, a general guardian appointed by the court, or a guardian ad litem or trustee appointed by the commission may claim on behalf of the minor all rights and privileges of the minor.

Under the provisions of the Probate Code, there can be no doubt that debts due a minor, other than wages, cannot be discharged by payment to the minor. Section 1430 of the Probate Code provides that, if a minor has no guardian of his estate, money belonging to the minor, not exceeding the sum of $250 may be paid to a parent of the minor, to hold for the minor upon written assurance of such parent that the total estate of the minor does not exceed $1,000 in value, and the receipt of such parent shall be an acquittance of the person making such payment. This section necessarily implies that, where the money due the minor exceeds $250, payment must be made to a lawfully appointed guardian, and also necessarily implies that under no circumstances can payment to the minor himself discharge the debt. The section, by its terms, applies to payment of all classes (except wages excluded by section 212 of the Civil Code) and including payments due under the Workmen's Compensation Act.

There are several other sections of the Probate Code that indicate the general policy of the law to protect minors and to prevent them from directly handling their own money. Section 1510 of the Probate Code provides that, if a minor recover a judgment for money, and there is no general guardian, one shall be appointed by the court to receive and care for the money received; but, if a minor has brought an action by a guardian ad litem and has recovered a judgment not in excess of $500 and the guardian ad litem is a blood relative of the minor, the money, with the approval of the court, may be paid to the guardian ad litem without bond. Section 1060 of the Probate Code provides that, when property is distributed to a minor who has no legal guardian, and the property consists in part at least of money, the executor or administrator may deposit the same with the county treasurer in the name of the distributee.

Applying the above statutory rules to the instant case, and particularly, the provisions of section 1430 of the Pro-

bate Code, it is clear that payment of the award directly to the minor employee was ineffectual to discharge the indebtedness created by the award, and that the petitioner, through his guardian, is entitled to a determination that the award has not been paid. The commission has the authority to condition its order upon the return of the building and loan certificates tendered by petitioner.

[5] It is true that the result of this opinion will be to compel the insurance carrier to pay the award twice, less the present market value of the certificates, and on its face may seem a harsh and unjust result. However, the principles herein enunciated merely carry out the general theory of the law to protect infants, not only from others, but also from themselves. It is a settled principle of the law that one deals with infants at his peril. Hakes Investment Co. v. Lyons, 166 Cal. 557, 137 P. 911; Flittner v. Equitable Life Assur. Soc., 30 Cal. App. 209, 157 P. 630; Tracy v. Gaudin, 104 Cal.App. 158, 285 P. 720.

The order of the commission is annulled, with directions to proceed in a manner in conformity with the views herein expressed.



5 Cal.2d 356

ROBERTS v. BRAE et al.

Sac. 4930.

Supreme Court of California.

Feb. 20, 1936.

1. Boundaries ⇐46(1)

To establish an agreed boundary line, it is necessary to show that there was an uncertainty or belief of uncertainty in location of line, that there was an agreement express or implied fixing the line, and that there was an actual designation of the line upon the ground and occupation in accordance therewith.

2. Boundaries ⇐48(8)

In absence of direct evidence, an uncertainty in location of a boundary line and an agreement fixing the line may be deduced from circumstances and inferred from conduct of parties, particularly from long acquiescence, but acquiescence must be in regard to a fence or monument as a boundary line, and not merely as to its existence as a barrier.

3. Boundaries ⇐48(8)

Evidence tending to establish long acquiescence in alleged agreed boundary line, marked by permanent buildings, and occupation of property in accordance therewith *held* to establish boundary in accordance with contentions of defendants in quiet title action.

4. Appeal and error ⇐110

Order denying a new trial *held* not an appealable order.

In Bank.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Minnie Roberts against Augusta Brae and others, in which the defendants filed cross-complaints. From a judgment for defendants, and from an order denying a new trial plaintiff appeals.

Judgment affirmed, and appeal from order denying a new trial dismissed.

Charles L. Gilmore, of Sacramento, for appellant.

Henry S. Lyon, of Placerville, and Elwood Murphy, of Berkeley, for respondent Scheiber.

C. W. Pearson, of Placerville, for respondent Brae.

WASTE, Chief Justice.

In this action to quiet title the plaintiff appeals from a judgment granting such relief to the defendants in conformity with the allegations and prayer of their respective cross-complaints.

Plaintiff claims to be the record owner of lots 4 and 5 in block 9 of the townsite of Diamond Springs, El Dorado county. The defendants are adjoining owners, being respectively, the record owners of lots 3 and 6. In other words, the defendant Scheiber owns a lot that adjoins plaintiff's lot 4, and the defendant Brae owns a lot adjoining plaintiff's lot 5. This action is the result of a dispute over the location of the boundary lines separating the three ownerships.

Plaintiff's proof offered subsequent to defendants' proof in support of their

cross-complaints, consisted principally of a showing of record title to lots 4 and 5 as described in the official map of Diamond Springs and the field notes of the original survey. The evidence discloses, however, that the original map has been destroyed by fire and was not available upon the trial and that the field notes, which lay out the lots in each block with reference to ill-defined surrounding streets, fail to disclose the relation of said lots or blocks to other monuments or property and cannot be located on the ground. Plaintiff testified that she had a survey made, but she failed to offer any evidence tending to establish the location of any of the parcels of property involved.

The defendants have always admitted that plaintiff is the record owner of lots 4 and 5, excepting therefrom any portion thereof within the boundaries of certain metes and bounds descriptions, to which they assert ownership. Defendants introduced in evidence deeds showing record title in them to lots 3 and 6 and established their payment of taxes for more than five years upon lands respectively assessed to them as lots 3 and 6. They also introduced a survey made at their request showing the boundaries of the present occupancies. The testimony of the surveyor reveals the impossibility of reconciling the official field notes with the boundaries of such present occupancies. In addition, the defendants testified that the old stone buildings located on lots 3 and 6, and asserted to encroach on plaintiff's property, have been in their present positions for more than 38 years and 35 years, respectively. The defendant Scheiber, owner of lot 3 testified that she had moved there 38 years previously; that she was a native of the locality and had known of the buildings all of her life; that at one time there was fastened to the top of the building on lot 3 a stone monument reading, "L. Lepitt 1857," tending to indicate construction in that year; and that plaintiff had been the owner of lots 4 and 5 since 1923, approximately 10 years prior to the commencement of this action, and had been in possession, as tenant, before that time. Defendant Brae testified that while she had purchased lot 6 in 1920, she had lived there about 35 years and "the stone building occupied the same position then as it does now." The surveyor called by defendants testified that the buildings were very old, one at least 50 years old. The trial judge viewed the premises. Upon the conclusion of the trial, it was found that the defendants were the owners and in possession of the properties described by metes and bounds in their respective cross-complaints, and that plaintiff was the owner and in possession of the property lying between said parcels.

[1] Judgment was properly entered for the defendants on their respective cross-complaints. The authorities indicate that in order to establish an agreed boundary line it is necessary to show that there was an uncertainty or belief of uncertainty in the location of the line, that there was an agreement, express or implied, fixing the line, and that there was an actual designation of the line upon the ground and occupation in accordance therewith. Muchenberger v. City of Santa Monica, 206 Cal. 635, 642, 275 P. 803; Ross v. Burkhard Inv. Co., 90 Cal.App. 201, 205, 265 P. 982, 985. The case last cited declares that "It is only when the owners of contiguous tracts of lands, * * * are uncertain as to the real boundary line which separates their respective properties, by mutual agreement, either express or implied, consent to accept a specified line as the true boundary, and thence forth occupy and use their respective properties in accordance therewith for a considerable length of time that the contracting parties and their privies in title will be estopped from repudiating the agreed boundary."

[2, 3] However, in considering the nature and character of proof required to show such uncertainty and to establish such an agreement, the authorities are equally clear that in the absence of direct evidence, the same may be deduced from circumstances and may be inferred from the conduct of the parties, particularly from long acquiescence. In Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260, 18 P. (2d) 58, 59, it is stated: "It is not necessary that the agreement between the parties be an express one. It may be inferred or implied from their conduct, especially where the condition is acquiesced in for the period of the statute of limitations. * * * 'A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both the adjoining owners have definitely defined such line by erecting a fence or other monument on it and that both have treated the same as

fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location.'" This identical language also appears in Southern Counties Gas Co. v. Eden, 118 Cal.App. 582, 586, 5 P.(2d) 654, and in Board of Trustees v. Miller, 54 Cal.App. 102, 105, 201 P. 952. The Vowinckel Case, just above quoted from, is cited with approval in Moniz v. Peterman, 220 Cal. 429, 435, 31 P.(2d) 353.

In Clapp v. Churchill, 164 Cal. 741, 745, 130 P. 1061, 1062, it is declared that "the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. * * * This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line." This is recognized in Board of Trustees v. Miller, supra, 54 Cal.App. 102, 106, 201 P. 952.

Of course, the acquiescence must consist in acquiescence in the fence or monument as a boundary line and not mere acquiescence in the existence of the fence or monument as a barrier. Staniford v. Trombly, 181 Cal. 372, 373, 375, 186 P. 599; Phelan v. Drescher, 92 Cal.App. 393, 268 P. 465. However, where, as here, the monument assumes the form of permanent buildings, the acquiescence therein must necessarily be as a boundary line and not as a mere barrier. In Phelan v. Drescher, supra, a division fence was involved and there were circumstances sufficient to overcome the inference of an agreed boundary line arising from long acquiescence therein. In other words, the fence had been acquiesced in merely as a barrier and not as a boundary line. Such is not the present case. Here there is no substantial evidence tending to rebut or overcome the presumption of an agreement raised by long acquiescence and occupation. As indicated above, the defendant Scheiber has been in possession for 38 years and the defendant Brae and her predecessors for 35 years. Plaintiff had been the owner of her property for over 10 years prior to the commencement of this action and in occupancy for a longer period. From other evidence it is apparent that the buildings, the lines, and the possessions of the parties have been the same for a long period, during which period there apparently have been no title disputes and no admissions that the lines were not true ones. In addition to long acquiescence and occupation, we have in the present case the existence of substantial and permanent improvements, owned by the defendants, upon the disputed pieces of land. Under the circumstances, we are satisfied that agreed boundary lines were established which entitled the defendants to their respective possessions. Other matters do not call for discussion.

[4] The judgment is affirmed. The order denying a new trial is nonappealable, and the purported appeal therefrom is therefore dismissed.

We concur: THOMPSON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



5 Cal.2d 336

In re MARCUS' ESTATE.

REDMOND et al. v. MARCUS.

L. A. 15538.

Supreme Court of California.

Feb. 17, 1936.

Appeal and error ⇐628(1)

Motion to dismiss appeal, apparently taken in good faith, for default in filing of printed transcript would be refused where delay occurred in process of printing.

In Bank.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge.

In the matter of the estate of Mary Marcus, also known as Mary Fishbein, deceased. Suit by Arthur Redmond, as executor, etc., and others against Louis Marcus. From a judgment for plaintiffs, defendant appeals. On plaintiffs' motion to dismiss the appeal.

Motion denied.

Benjamin P. Riskin, of Los Angeles, for appellant.

William P. Redmond and Lamdan & Damon, all of Los Angeles, for respondents.

PER CURIAM.

Respondents have moved to dismiss the appeal in the above-entitled cause on the ground, first, that appellant failed to file his printed transcript as required by the rules of the court; and, secondly, on the ground that appellant failed to file his opening brief within time.

The transcript on appeal has been on file since October 25, 1935. On considering the first motion, the court has reached the conclusion that, while the appellant was apparently technically in default for the period of seven days, the delay occurred in the processes of printing, and that the appellant should be relieved of his default. The appeal appears to have been taken in good faith and should, under the circumstances, be heard on its merits. The motion to dismiss the appeal on the first ground is therefore denied.

As to the second motion, appellant, by order of the court, was given to and including December 24, 1935, within which to file his opening brief. This motion was apparently made upon a mistake of fact as to dates, and is not entitled to further consideration. The motion to dismiss the appeal on the ground of the alleged failure of the appellant to file his opening brief within time is therefore denied.

5 Cal.2d 247

PACIFIC EMPLOYERS INS. CO. v. CHAVEZ et al.

S. F. 15451.

Supreme Court of California.

Jan. 29, 1936.

Rehearing Denied Feb. 27, 1936.

1. Master and servant ⇐405(4)

Evidence *held* to sustain finding that death of watchman by fall into elevator shaft which he was not to use except in case of fire occurred within scope of employment in view of inference that watchman obeyed orders and of qualified nature of instructions to watchman not to use elevator.

2. Master and servant ⇐417(7)

Where death occurs to employee during hours of employment and factual situation may reasonably give rise to conflicting inferences on question whether injury arose out of and in course of employment, finding of commission supporting award of compensation will not be disturbed.

3. Master and servant ⇐417(7)

Where finding of Industrial Commission was not wholly unjustified on factual situation before it in concluding that employee was acting in pursuit of his duties at time he was killed, Supreme Court could not disturb finding of commission that injury was inferentially attributable to employment.

4. Master and servant ⇐388

Facts showing that son turned over entire earnings to his mother, that they lived on such earnings, and that mother had no other source of income, justified award to mother as wholly dependent upon son, notwithstanding she collected $340 on son's life policy.

In Bank.

Proceeding by the Pacific Employers Insurance Company to review an award of compensation by the Industrial Accident Commission under the Workmen's Compensation Act to Maria Chavez for the death of Joseph Chavez, an employee of the Western Wool Manufacturing Company.

Award affirmed.

Prior opinion, 43 P.(2d) 818.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

PER CURIAM.

The petitioner seeks to annul an order of the Industrial Accident Commission which awarded a death benefit to the mother of the deceased employee.

Joseph Chavez was employed as a night watchman for the Western Wool Manufacturing Company at its mill and storehouse in San Francisco. The plant, consisting of three floors and a basement, was equipped with American District Telegraph fire and watchman's signal system. The signal boxes were so installed and arranged that they must be punched in reg-

ular order and at specified times by specially designed keys, in order that proper inspection be recorded. It was Chavez' duty to perform this service every hour, commencing at 6 p. m. on the first floor and proceeding thence to the upper floors. He was instructed to use the stairways leading from one floor to the other, in order to obtain complete inspection, and not to use the elevator, except "chasing for a fire". It was a rule of employment generally applicable to all employees that the elevator was to be used only for handling freight and not as a passenger elevator. On the evening of March 15, 1934, the recording due a few minutes after 6 did not register at the office of the American District Telegraph and an inspector went to the plant to discover the cause. He searched the premises and found Chavez unconscious in the basement just outside of the bottom of the elevator shaft. Chavez' key showed that it had been used in the boxes on the first floor and was set for the next box to be keyed. The elevator was at the third floor and the elevator gate at the first floor was up and jammed to such an extent that considerable force was required to lower it. Chavez died the next day without regaining consciousness sufficiently to be able to state how he had incurred his injury.

[1] There was testimony on the part of employees that when they left the plant and Chavez arrived on the evening of May 15th at 5 o'clock the elevator was at the second floor and that the safety gates on all of the floors were down. The locked condition of the safety gate on the first floor, and the further fact that that gate was out of order and would not remain up without support, however, indicated that these witnesses might have been mistaken as to the position of the safety gate on the first floor. If that gate was up when Chavez went on duty, it might be inferred from the circumstances that, by accident, he fell down the elevator shaft. Furthermore, as noted, there were two ways to go from floor to floor, by the stairway and by the elevator. If no instruction had been given Chavez to refrain from using the elevator in making his rounds and he could, at his option, use either means to ascend to the upper floors, there could be no room for the claim that the injury was not one arising out of and in the course of the employment. Or if it appeared beyond dispute that Chavez was attempting to use the elevator for the authorized purpose, namely, "chasing for a fire", there could be no room for the claim that he was not acting within the scope of his employment.

The petitioner insists that the only reasonable inference to be drawn from the facts is that the employee, at the time of his injury, was attempting to use the elevator and for an unauthorized purpose in disobedience of his instructions. The respondents take the position, and we think justifiably, that, since there is no direct evidence as to the purpose of the employee in using the elevator, it is just as reasonable to infer from the circumstances that he was attempting to use the same for an authorized purpose, and that it is more reasonable so to infer because not to do so and to draw the inference contended for by the petitioner would be to convict the employee of disobedience of his instructions. The petitioner argues that there was no evidence of fire at a time after the accident when the body of the employee was found near the bottom of the elevator shaft. Even so, it is likewise true that there was no direct evidence that the conditions actuating the conduct of the employee at the time he fell down the shaft did not justify his presence near the elevator. This, coupled with the inference that the injury might have been caused by accident, tends to support the conclusion of the commission that the injury occurred within the course of the employment.

[2] It is the law of this state that where death occurs to an employee during his hours of employment and the factual situation may reasonably give rise to conflicting inferences on the question whether the injury which caused death arose out of and in the course of the employment, the finding of the commission supporting an award of compensation to dependents will not be disturbed. Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 P. 17; Western Grain, etc., Co. v. Pillsbury, 173 Cal. 135, 159 P. 423; see, also, North Pac. S. S. Co. v. Industrial Accident Commission, 174 Cal. 500, 163 P. 910, and United States Fidelity, etc., Co. v. Industrial Accident Commission, 174 Cal. 616, 163 P. 1013.

Also in numerous cases in this state awards of compensation have been upheld where "employees were found dead with

no witnesses to the accident, but there were traumatic injuries inferentially attributable to the employment, with no proof of other cause of death." Eastman Co. v. Industrial Accident Commission, supra, 186 Cal. 587, at page 590, 200 P. 17, 18, and cases cited therein.

[3] The foregoing cases in this state would seem to control the disposition of the petitioner's contention. In view of the qualified instruction received by the watchman and the permitted use of the elevator for some purpose, it is not the function of this court to say that the commission was wholly unjustified, on the factual situation before it, in concluding that the employee was acting in the pursuit of his duties as a watchman in accordance with his instructions. We may not then disturb the finding of the commission that the injury was inferentially attributable to the employment.

It therefore becomes unnecessary to pass upon the contention advanced by the respondents that in any event a disobedience of instructions on the part of the employee was no more than serious and wilful misconduct within the terms of section 6 (a) (4) of the Workmen's Compensation Act (St. 1917, p. 834, as amended by St. 1929, p. 430), which provides for a reduction by one-half of compensation otherwise recoverable in cases where the injury is caused by the serious and wilful misconduct of the employee except that serious and wilful misconduct is not a defense to the claim of dependents if the injury result in death.

On the point that Chavez was guilty of such disobedience of instructions as would exclude compensation, numerous cases in other jurisdictions have been cited. A general rule is declared in Hibberd v. Hughey, 110 Neb. 744, 194 N.W. 859, 860, as follows: "The general rule is that an injury arises out of his employment when the servant is performing some service for the master, although in a manner contrary to his instructions; and this because he is acting within the scope of his employment and his departure from instructions were mere acts of disobedience." While recognizing that general rule, the court nevertheless applied to the facts there involved an exception declared in cases which hold that disobedience of a positive order as to the place where the work is to be performed constitutes a departure from the employment and that an injury then occurring does not arise out of and in the course of the employment. There are cases which hold that by his disobedience of unqualified instructions the employee has departed from the sphere or course of his employment and thereby rendered his injuries noncompensable. San Francisco & S. Ry. Co. v. Industrial Accident Commission, 201 Cal. 597, 258 P. 86; Fournier's Case, 120 Me. 236, 113 A. 270, 23 A.L.R. 1156; Dulac v. Dumbarton Woolen Mills, 120 Me. 31, 112 A. 710; Hibberd v. Hughey, supra; Hamberg v. Flower City Specialty Co., 202 App.Div. 113, 195 N.Y.S. 170; Ebberman v. Walther & Co., 209 App.Div. 248, 204 N.Y.S. 406; Cassell v. C. F. Mueller Macaroni Co., 99 N.J.Law, 270, 122 A. 242; Newberry v. Industrial Commission, 341 Ill. 554, 173 N.E. 472; Moyer v. Packard Motor Car Co., 205 Mich. 503, 171 N.W. 403; see Pacific Coast Casualty Co. v. Pillsbury, 31 Cal.App. 701, 162 P. 1040. The cases in which compensation has thus been denied, however, are grounded upon the absence of any reasonable inference appearing to the fact finding body that the employee had any duty to perform in being where he was or that his act was consistent with his instructions or with permission implied from the surrounding facts. In a case where the evidence was conflicting as to whether the employee was making a permitted use of an elevator the court refused to disturb a finding adverse to the employee. Miliato v. Jack Rabbit Candy Co. (Mo.App.) 54 S.W.(2d) 779. In cases where the commission found that the employee met his death while making a permitted use of the elevator, although the use thereof generally was prohibited, the award was upheld. American Mutual Liability Ins. Co. v. Hardy, 36 Ga.App. 487, 137 S.E. 113; Rockford Cabinet Co. v. Industrial Commission, 295 Ill. 332, 129 N.E. 142; Archambald v. Lake Champlain Pulp & Paper Co., 204 App.Div. 651, 198 N.Y.S. 679. The last cited cases tend to support the theory of the respondents herein, but, as indicated, it is unnecessary to resort to adjudications in other states, for the reason that our own decisions are adequate in the disposition of this proceeding.

[4] The remaining contention of the petitioner is that the commission exceeded its powers in finding that the mother of the decedent, to whom the award was made, was totally dependent upon the de-

cedent. The mother had been a widow since 1905. The facts before the commission were that the son turned over to her his entire earnings, that both of them lived together on such earnings and that the mother had no other source of income. These facts support the commission's conclusion that the mother was wholly dependent upon the decedent. Peterson v. Industrial Accident Commission, 188 Cal. 15, 204 P. 390. The fact that she had collected $340 from insurance on the life of her son would not change the result under the holding in the last cited case.

The award is affirmed.



5 Cal.2d 301

In re LEAHY'S ESTATE.

S. F. 14916.

Supreme Court of California.

Feb. 5, 1936.

1. Judgment ⇐199(1)

Statute providing that when motion for directed verdict, which should have been granted, has been denied and verdict returned against moving party, trial court may, before entry of judgment, render judgment for aggrieved party, notwithstanding verdict, *held* applicable to motion for judgment notwithstanding verdict (Code Civ.Proc. § 629).

2. Trial ⇐178

Directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which it is entitled, evidence is insufficient to support verdict for plaintiff if such verdict were given (Code Civ.Proc. § 629).

3. Wills ⇐82

Will giving testator's estate to preferred legatees as against brother and sister is not merely for that reason an unnatural will.

4. Judgment ⇐199(3)
Wills ⇐55(5), 166(8)

Evidence in will contest *held* to show that testatrix, although physically weak, had mental capacity to execute will, and that her sister and nephew did not exercise "undue influence" to procure will, entitling proponents of will to judgment notwithstanding adverse verdict (Code Civ.Proc. § 629).

Proof of "undue influence" in procurement of will exists where evidence is of such nature as to warrant inference that will was direct result of influence exerted for purpose of procuring will and was not natural result of uncontrolled will of testatrix.

[Ed. Note.—For other definitions of "Undue Influence," see Words & Phrases.]

5. Wills ⇐166(12)

Undue influence in procuring will may be established by indirect and circumstantial evidence, but evidence must raise more than a suspicion and amount to proof.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the Matter of the Estate of Ella A. Leahy, deceased. Will contest by Anna L. Dixon against Harry M. Cornyn, as Executor of the estate of Ella A. Leahy, deceased, and others, wherein verdict was returned for contestant. From a judgment for defendants, notwithstanding the verdict, the contestant appeals.

Affirmed.

Prior opinion, 45 P.(2d) 365.

Aaron N. Cohen, John Hodghead, and C. K. Bonestell, all of San Francisco, for appellant.

John H. Ankele, Jr., and Ivan Maroevich, both of San Francisco, and Edmund Scott, of Redwood City, for respondents.

CONREY, Justice.

Ella A. Leahy, an unmarried woman of the age of about 62 years, died on the first day of August, 1932, in San Mateo county, where at that time she resided in the home of her sister, Mary L. Cornyn. With Mary L. Cornyn also lived her son, Harry L. Cornyn. On June 24, 1932, Miss Leahy executed a will by the terms of which she gave $500 to her sister Anna Dixon, and, after making other small specific bequests, gave the rest of her estate to Mary Cornyn, naming Harry Cornyn as sole executor without bonds. This will having been duly admitted to probate, Anna Dixon thereafter filed her petition contesting its probate on several grounds, all of which except that of undue influence were abandoned during the trial. At the conclusion of the evidence,

respondents moved for a directed verdict, which motion was denied, and the jury returned a verdict in favor of the contestant. Respondents then moved for judgment notwithstanding the verdict, which motion was granted, and judgment entered accordingly. This is an appeal by the contestant from that judgment.

[1, 2] By section 629 of the Code of Civil Procedure it is provided that when a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, may render judgment in favor of the aggrieved party notwithstanding the verdict. It may plainly be inferred that the rules governing a directed verdict are those which govern the making of an order or judgment notwithstanding the verdict. It is established law that a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." In re Estate of Lances, 216 Cal. 397, 400, 14 P.(2d) 768. We must, therefore, examine the evidence for the purpose of determining the right of the trial court to grant the motion for judgment in this case.

[3] A will giving the estate of the testator to preferred legatees as against a brother or a sister is not merely, for that reason, an unnatural will. "As the heirs of decedent were collateral it may not be said that the will was unnatural." In re Estate of McDonnell, 109 Cal.App. 577, 578, 293 P. 651, 652. In Re Estate of Chevallier, 159 Cal. 161, 169, 113 P. 130, 134, referring to a will which showed discrimination in favor of one sister as against another, this court said: "She remembers one sister by a gift of a personal memento and to the other, evidently the favored sister with whom for years she had been living, she leaves the rest of her estate. Such disposition, so far from giving evidence of testamentary incapacity, was not even unnatural." See, also, In re Estate of Easton, 140 Cal.App. 367, 35 P.(2d) 614.

[4] The testator died as the result of a cancer, from which she had been suffering for at least many months. During that time physical weakness increased; but the evidence leaves no doubt of her mental capacity at the time when the will of June 24th was executed. Contestant testified that at some time in June, 1932, Mary told her that Ella was getting very weak and losing her mind. But that was not competent evidence of the fact in question. Appellant's own review of the evidence shows nothing more than physical weakness of the testator. The lawyer who came on June 24th at Harry Cornyn's request and drew the will testified that he obtained his instructions from Miss Leahy in her room, and that at that time there was no one else present. This testimony shows instructions by the testator, given in detail respecting the various provisions of the will. At one point, where some gifts of jewelry were being discussed, the attorney went out and called Harry Cornyn and asked him to bring a certain box of jewelry. It further appears from this testimony that after the will had been written and was ready to be executed, witnesses were procured for that purpose, and it appears that Harry Cornyn was present at the time of execution of the document. The attorney, and also Miss Brady, a witness to the will, testified that when the attorney started to read the will, Miss Leahy took it out of his hands and said, "I will read it myself," and she had on her glasses and read it. From a full consideration of the evidence, therefore, it is or should be undisputed that at the time of the execution of the will the testator was of sound and disposing mind, and that there was no direct evidence of anything done by Mrs. Cornyn or by her son in the nature of persuasion, request, or insistence of any kind in relation to the making of the will.

[5] By reason of the facts above stated, the contestant is obliged to rely upon indirect and circumstantial evidence. That such evidence may be sufficient to establish undue influence in the procuring of a will is confirmed by numerous decisions. Thus in an early case it was said: "Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to

proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." In re Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101, 106. Again it was said: "While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence (In re Estate of McDevitt, 95 Cal. [17], 33, 30 P. 101), such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix. (See In re Estate of Arnold, 147 Cal. 583, 589, 82 P. 252; In re Estate of Welch, 6 Cal.App. [44], 50, 91 P. 336.)" In re Estate of Snowball, 157 Cal. 301, 307, 107 P. 598, 601.

Let us then inquire what further evidence was produced which under the rule of the foregoing cases would have any substantial value in support of the contention that undue influence was used in procuring the execution of the will in the instant case. One circumstance relied upon is that at one time Miss Leahy had intended to divide her estate equally between her two sisters. In September, 1930, she had made a will to that effect. On April 26, 1932, she executed a codicil to that will, thereby making changes in some small legacies; and yet on June 24, 1932, she revoked those former instruments and executed the will against which the present contest is directed. It further appears that for a considerable period of time before June 24, 1932, Harry Cornyn had been active in attention to the business of Miss Leahy, and that in connection with that activity considerable sums of money came into his hands; numerous checks were drawn to his order and signed by her; a parcel of real property was conveyed by decedent to Mary Cornyn; also decedent purchased a trust deed which was outstanding against Mary Cornyn's home and thereafter transferred the papers to Harry Cornyn as trustee for his mother. The evidence of these transactions shows the close relations of affection and confidence existing between decedent and Mrs. Cornyn and her son, and a business agency as between decedent and Harry Cornyn, but it does not appear that any charges of fraud or wrongdoing exist with respect to those transactions. The record is singularly lacking in evidence of any activity on the part of Mary Cornyn personally in procuring the will to be made in her favor.

Another circumstance relied upon by appellant is the fact, as testified to by her, that while Miss Leahy was living at the house of Mary Cornyn, the witness and her daughter were never able to see Miss Leahy alone. "I went out on the 24th day of June, 1932, but we were not allowed to go in." On cross-examination she admitted that after waiting about twenty minutes she was admitted, and was informed at the time that she was required to wait because Miss Leahy's attorney was there with her. While Mrs. Dixon complains that she was never able to see her sister, the testator, alone, there is no evidence that she ever requested a private interview or that such request, if made, was refused.

It is conceded that none of the circumstances shown by the evidence, taken alone, would have been sufficient proof of undue influence, but it is contended that when all are taken together they are sufficient to support an inference that undue influence was exercised, and thus are sufficient to support the verdict. We have compared the record here with various cases wherein a conclusion was announced in line with this contention; for example, In re Estate of Nelson, 134 Cal.App. 561, 565, 25 P.(2d) 871; In re Estate of Graves, 202 Cal. 258, 262, 259 P. 935. We find in those cases various facts in the relations of the parties, and pertaining to the transactions bearing upon the execution of the will, very different from the facts in the case at bar. In this case we think that the evidence for the contestant goes no further than perhaps to justify suspicion; but it has no substantial force as evidence that such suspicion is well founded. This brings us to the conclusion that the court did not err in granting the motion for judgment notwithstanding the verdict.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

5 Cal.2d 337

PEOPLE v. DUGGER.

Cr. 3902.

Supreme Court of California.

Feb. 17, 1936.

1. Assault and battery ⇐92
Burglary ⇐41(1)
Kidnapping ⇐5
Mayhem ⇐5
Rape ⇐51(1), 53(1)
Robbery ⇐24(1, 6)

Evidence supported conviction of assault with intent to commit robbery, assault by means of force likely to produce great bodily harm, mayhem, robbery, rape, attempted rape, burglary, and kidnapping for purpose of robbery (Pen.Code, § 209, as amended by St.1933, p. 2617).

2. Kidnapping ⇐6

Evidence that victim of kidnapping for purpose of robbery suffered bodily harm warranted imposition of death penalty, where evidence sustained conviction (Pen.Code, § 209, as amended by St.1933, p. 2617).

3. Criminal law ⇐570(1)

Medical evidence that, although defendant was sexual pervert, a sadist, and a mental defective, defendant was legally sane, and defendant's admissions that he was aware of wrongful nature of acts charged, *held* to sustain finding that defendant was sane when offenses were committed, and hence conviction would be affirmed (Pen. Code, § 209 as amended by St.1933, p. 2617).

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Thomas Edward Dugger was convicted of assault with intent to commit robbery, assault by means of force likely to produce great bodily harm, mayhem, robbery, rape, attempted rape, burglary, and kidnapping for purpose of robbery, and he appeals.

Affirmed.

Charles V. Rude, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

In an indictment returned by the grand jury of Los Angeles county containing eleven counts, the defendant was charged with assault with intent to commit robbery, assault by means of force likely to produce great bodily harm (in three separate counts), mayhem, robbery, rape, attempted rape, burglary, and kidnapping for the purpose of robbery. A count charging violation of section 288a of the Penal Code was dismissed upon request of the district attorney. To these several counts the defendant entered pleas of not guilty and not guilty by reason of insanity. At the conclusion of the trial upon the general issue, the jury returned verdicts finding defendant guilty as charged in each count of the indictment and, under the provisions of section 209 of the Penal Code (as amended by St.1933, p. 2617), fixed the penalty at death upon the charge of kidnapping. On the trial of the sanity issue, the jury found that defendant was sane upon the occasion of the commission of each of the several offenses. Though notice of appeal was regularly given, counsel who represented defendant upon the trial has declined to argued the cause orally before this court or to file a brief herein. The cause therefore stands submitted on the transcript of the proceedings had in the court below and a digest of such proceedings filed by the Attorney General.

We have carefully examined the entire record, including the evidence, and have found nothing therein that would warrant this court's interfering with the judgment of the court below imposing the extreme penalty in conformity with the verdict of the jury. The evidence is ample to sustain defendant's conviction of the several offenses charged in the indictment. Three women testified upon the trial that they were the victims of defendant's brutal and fiendish assaults. One testified that while walking along the street at night she was set upon by the defendant and beaten about the face and body until she fell to the ground. As a result of this unprovoked attack, the witness lost the sight of one eye. The second woman, a clergyman's wife, testified that, after she had given food to the defendant in her home and was about to furnish him with carfare, in response to his request therefor, he snatched her purse from her hands, felled her with a blow to the face, and, following additional blows upon her body, succeeded in having sexual intercourse with her against her will. The defendant previously had done some gardening for the husband of the victim. This attack oc-

curred approximately two hours after the attack on the first woman. As a result thereof, the witness lost two teeth and suffered numerous cuts and bruises, which necessitated hospitalization for about seventeen days.

The third victim testified that, after defendant had obtained entrance to her home at night by stealth and without her knowledge, he had subjected her to a brutal beating, telling her he wanted money and love; that, when she was helpless from the blows rained upon her, the defendant dragged her from one portion of the house to another against her will, and then attempted to have intercourse with her. Failing in this, he ransacked certain dresser drawers and ultimately departed. Nine days intervened between the former two attacks and this one. The last victim suffered the loss of six teeth, sustained three fractured ribs, and received numerous bruises and contusions, necessitating her confinement in a hospital for approximately twelve days.

The prosecution read into evidence a full and complete confession made by defendant to the police. His testimony before the grand jury was also introduced. Upon each of these occasions the defendant admitted the commission of the three attacks substantially as above outlined. Other evidence was also adduced by the prosecution. The defendant offered no evidence on the trial of the general issue.

[1, 2] As above stated, the evidence fully supports the several verdicts of the jury. Section 209 of the Penal Code, as amended in 1933, and as construed and upheld in People v. Tanner, 3 Cal.(2d) 279, 44 P.(2d) 324, warrants the imposition of the extreme penalty. At least as to one of the victims, the evidence points to the commission of the crime of kidnapping for purpose of robbery, as the same is defined in the cited Code section, and, the victim thereof having suffered bodily harm, the jury was well within its province in fixing the penalty at death.

Defendant's entire defense was addressed to the sanity issue. In this connection, he called several lay witnesses for whom he had formerly worked. Some testified that they had found him to be gentle and intelligent. Others testified that they had heard him talking to himself and had seen him in semipublic places with his person exposed. Others stated that he was a nervous type and that he lacked continuity of thought. The defendant took the stand in his own behalf and admitted the assaults on his three victims. In each instance he stated that the motivating force was robbery. His testimony corroborates that of his victims. He also testified that on many occasions prior to the commission of the offenses above described he had seen visions and had suffered from hallucinations, and that while serving in the Army in Panama he had been temporarily incarcerated in an asylum. We pause to state, however, that at no time had he ever been judicially declared insane. He admitted a long history of self-abuse, venereal disease, and depravity. His testimony at times was incoherent and rambling. On cross-examination he definitely stated that at the time of perpetration he was aware of the wrongful character of the acts for which he stands convicted. A doctor called by defendant, who had specialized in nervous and mental diseases, testified that defendant was a psychopath, a sexual pervert, a sadist, and a mental defective, but that he gave "no evidence of being legally insane." He further described defendant as a high-grade moron who occasionally becomes emotionally unstable but at the same time understands the nature and consequences of his acts. Defendant was finally characterized by the witness as 100 per cent. degenerate. In substance, this was the extent of the defense offered.

Three other doctors specializing in nervous and mental diseases were appointed by the court to examine the defendant. One of these witnesses testified that in his opinion the defendant was insane at the times of the commission of the offenses and at the time of trial. He based his conclusion on the history of the case, on defendant's statements that he suffered from hallucinations, and upon the fact that formerly defendant had been confined in an asylum. The second doctor was the superintendent of the Norwalk State Hospital for the insane. He testified that he had examined the defendant mentally and physically and had gone over his entire history, and concluded therefrom that the defendant was sane when the offenses were perpetrated and at the time of trial, and that defendant was aware of the nature and wrongful character of his acts.

The third doctor appointed by the court testified, after examining defendant, that in his opinion the defendant was legally and medically sane and understood, not

only the nature and character of his acts, but the difference between right and wrong. He described defendant as a "constitutional psychopath, who is undoubtedly hyper-sexed, and who * * * did things he knew were wrong, but did them under impulse to some extent."

[3] The evidence is ample to support the finding of the jury that defendant was sane when the offenses were committed. In People v. Keaton, 211 Cal. 722, 724, 296 P. 609, it is declared that "responsibility depends upon whether the defendant knew the nature and quality of the act at the time of its commission, and the wrongfulness of the act. If he had sufficient mental capacity to know what he was doing, and to know that it was wrong, he is legally accountable for his act. Even though he may be mentally abnormal or defective, or may suffer from some nervous disorder, he is, under our law, held to full responsibility for his act, unless the evidence brings him within the strict legal meaning of insanity." The question of the weight and credibility to be given to the testimony of the several witnesses was within the exclusive province of the jury.

We find nothing in the rulings of the court on the evidence or in its instructions to the jury that approximates prejudicial error.

The judgment and order are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 330

CROUCH v. GILMORE OIL CO., Limited, et al. (two cases).

DORAN v. GILMORE OIL CO., Limited, et al.

DORAN et al. v. SAME.

L. A. 15586.

Supreme Court of California.

Feb. 14, 1936.

As Amended on Denial of Rehearing March 12, 1936.

1. Master and servant ⇐330(3)

Where evidence of master and servant relationship also proves that servant was not acting within scope and course of his employment at time of act for which master is claimed to be liable, prima facie case made by third person, suing master for resulting injuries, is rebutted, and master need not negate his liability.

2. Automobiles ⇐245(32)

Where evidence of individual defendant's status as independent contractor and his ownership of truck, driven by his employee, in action for injuries in collision between automobile and truck, was free from suspicion, clear, and convincing, court did not err in granting nonsuit as to defendant corporation.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Four consolidated actions by Joseph Crouch, a minor, by his guardian ad litem, Homer L. Crouch, by the latter for himself, by Jack L. Doran, and by Hazel K. Doran and husband, respectively, against the Gilmore Oil Company, Limited, and others. From a judgment of nonsuit as to named defendant, plaintiffs appeal.

Affirmed.

For prior opinion, see (Cal.App.) 48 P. (2d) 731.

Meserve, Mumper, Hughes & Robertson, J. D. Taggart, and Baldwin Robertson, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Salisbury & Robinson, Salisbury, Robinson & Himrod, B. R. Ware, and W. B. Dennis, all of Los Angeles, for respondent.

THOMPSON, Justice.

Four cases were brought against defendants for damages arising out of an automobile collision. They were consolidated, and after plaintiffs had rested their case the defendant Gilmore Oil Company, Ltd., a corporation, to which we may hereafter refer as the Gilmore Oil Company, made a motion for a nonsuit, which was granted. The case proceeded to judgment as between the remaining parties. The plaintiffs, however, prosecute this appeal from the judgment of nonsuit.

The individual defendants and representatives of the defendant corporation were examined by plaintiffs under section 2055, Code of Civil Procedure, with the apparent object of establishing that the defendant

H. D. Shaw was an employee of the Gilmore Oil Company and acting within the scope of his employment at the time of the accident.

As the result of such examination, with its attendant cross-examination, the following essential facts were developed: The defendant Smith was the principal owner of the "Smith Tank Line Company," owning 25 or 30 trucks and engaged in the business of trucking gasoline as a common carrier. The Gilmore Oil Company was engaged in the production and sale of gasoline and oil. During the month of May, 1931, the defendant Smith, doing business under the name of Owens Valley Oil Company, and the Gilmore Oil Company entered into an agreement whereby the company was to sell Smith gasoline at their San Fernando bulk plant at their regular price, for the purpose of resale by Smith in a specified district north of Saugus and including the Owens valley. The defendant corporation was only supplying one customer in the granted district at the time, which customer was thereafter supplied by the Owens Valley Oil Company. For the purpose of carrying out the contract and of selling gasoline and oils, Smith purchased the truck involved in the accident. We may parenthetically remark that the truck was different in construction from any of those owned and operated by the Gilmore Oil Company. At Smith's request, the defendant corporation painted the truck in the colors used by it and about 4,500 service station operators on the Pacific Coast selling its products, and on the sides painted the word "Gilmore" and on the rear its advertising "insignia," the lion's head. However, on the door of each side of the cab of the truck were painted the words "Owens Valley Oil Company." The defendant corporation sold Smith gasoline to operate his truck at one cent below its regular price. The defendant Shaw had been employed by Smith as a truck driver in his operation of the Smith Tank Line Company. Smith placed him in charge of the gasoline truck, with instructions to sell the gasoline and to that end to solicit regular business throughout the territory. At all times here involved Shaw's salary was paid by Smith, and the latter told Shaw "what to do." Actual operations started about May 20, 1931, at which time Shaw told a representative of the Gilmore Oil Company that they had no sales slips printed, and secured from him a pad of sales slips, contract forms for service stations, and conditional sales forms for pumps. At the time and at his request, Shaw was informed and instructed, when filling out such slips or forms, to scratch out the name Gilmore Oil Company, Ltd., and in place thereof insert the name "Owens Valley Oil Company." Sales slips for the Owens Valley Oil Company were ordered and received about the first of June. Thereafter they were used exclusively. However, the suggested procedure was not followed with the borrowed forms in two sales slips, one conditional contract for one pump and in one place on one copy of a service station contract. The pump, however, was in no way connected with the Gilmore Oil Company, but was purchased by Smith from another concern. The service station contract with the purchaser of this particular pump discloses that Shaw did strike out the name of Gilmore Oil Company and substitute the Owens Valley Oil Company. It also appears that Shaw consulted a Mr. Boyd, with the Gilmore Oil Company, concerning the attitude of the major companies as to price cutting, and also asked him how "to go about" refusing to sell gas to a station where the contract provided that it might be terminated by a 24-hour notice. Evidence was adduced that prior to the agreement with Smith, the Gilmore Oil Company had refused to sell gas in tank lots to an operator of a station in the territory subsequently assigned to Smith, giving as its reason a rule that gas would not be sold at the refinery, nor was any one to get gas therefrom except in a company tank. In keeping track of gasoline sales to Smith, the Gilmore Company would, if it had any doubt about the amount in the truck when brought in with gasoline, take it back and credit Smith with the amount; otherwise it was simply filled up and a charge made for that amount. Sometimes, when gasoline was in the truck, it was left at the Gilmore San Fernando plant, but not at the garage where the company's trucks were housed. There was also testimony that one complaint was made to the company about the service, and it was immediately referred to Smith. However, the witness testified in effect that if Smith were to neglect "a substantial number of Gilmore products customers he imagined that they would make arrangements to take over the territory themselves." More than one year after the accident Smith withdrew from the arrangement he had with the

Gilmore Oil Company and sold the truck to the company. At all times prior thereto the state license had been in Smith's name.

Under these facts we are concerned with whether the appellants, in order to recover upon the theory of respondeat superior, established sufficiently to go to the jury the two requisites of (1) the status of master and servant and (2) that the act was done within the scope of the servant's employment. See Kish v. California State Automobile Ass'n, 190 Cal. 246, 251, 212 P. 27, 29, and Preo v. Roed, 99 Cal.App. 372, 380, 278 P. 928. In determining the question our problem will be clearer and easier of solution if we inquire whether under the circumstances of the proof herein, verdicts for the appellants would have been allowed to stand, or whether judgments based thereon would have been reversed for lack of sufficient evidence. Robbiano v. Bovet, 218 Cal. 589, 599, 24 P.(2d) 466. It cannot be fairly doubted that Smith was an independent contractor and that Shaw was his employee. But, say appellants: An inference arises from the fact that the truck was painted with Gilmore colors and bore the company's advertising insignia, to the effect that Smith was in fact the agent of the Gilmore Oil Company. They say that the other circumstances strengthen the inference to such an extent that the jury would have been justified in returning verdicts for the plaintiffs. In denying a petition for a hearing in the case of Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198, holding such inferences "must yield to the direct and unequivocal evidence rebutting such inference," this court said: "We desire to point out that respondent's prima facie case was based solely on an 'inference,' and not on any 'presumption' declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. Section 1938, Code Civ.Proc. In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employee of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference, based solely on the fact of appellant's ownership of the automobile, and the further fact that the person driving was an employee of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict therefore was contrary to the evidence."

Again in Fahey v. Madden, 56 Cal.App. 593, 206 P. 128, 129, it is said: "The question is whether the inference on which the prima facie case of agency is based creates a substantial conflict as against clear, positive, and uncontradicted evidence to the contrary. Evidence could not well be more clear and positive than that given by defendants' witnesses relative to the subject under discussion, and it is apparently free from suspicion. Under such circumstances, it must be held, on the authority of Maupin v. Solomon, supra, that, as to the defendant Madden, it was error to submit the case to the jury. See, also, Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461; Gates v. Pendleton [184 Cal. 797] 195 P. 664."

To the same effect we may also refer to the more recent cases of Market St. Ry. Co. v. George, 116 Cal.App. 572, 3 P.(2d) 41, and Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747. In the latter case Mr. Justice Richards, writing the opinion, distinguished the cases of Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518, Grantham v. Ordway, 40 Cal.App. 758, 182 P. 73, and Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358, from those we have cited by pointing out that in those cases, as in the Ransford Case, the evidence was conflicting and hence the inference was not dispelled.

[1] Commencing with the case of Kish v. California State Automobile Ass'n, supra, a little different phase of the same general question has been emphasized. In that case a nonsuit was granted, and on facts more strongly favoring appellant than those here involved. The court said: "If the same testimony which proved the relationship of master and servant proved that, at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope of and in the course of his employment, the prima facie case made by plaintiff is rebutted by the very proof offered to prove the first fact. It is not necessary, therefore, for the defendant to negate the master's liability, inasmuch as the plaintiff has done so herself. The proof at that stage lacks an essential element to support plaintiff's cause of action." This language may aptly be paraphrased and applied in the instant cause. It was approved and followed in

Lane v. Bing, 202 Cal. 577, 580, 262 P. 317, and Preo v. Roed, supra. In all three cases the evidence relied upon to establish the inference was adduced, as it was in this case, by calling the defendants under section 2055 of the Code of Civil Procedure.

[2] While we have set out the salient facts, yet it is only fair to declare that we have read the record in its entirety and feel constrained to say that the testimony of Smith's status and the ownership of the truck is free suspicion, clear, and convincing. Under such circumstances the court did not err in granting the nonsuit.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



5 Cal.2d 226

BROWN v. FERDON et al.

L. A. 14775.

Supreme Court of California.

Jan. 28, 1936.

1. Evidence ⇐5(2)

In determining constitutionality of 1933 Code section precluding deficiency judgment on trust deed or mortgage obligation unless notice of breach and election to sell was recorded one year before sale, which was limited to September 1, 1936, Supreme Court could take judicial notice of economic difficulties of times and hold section to be emergency legislation (Civ.Code, § 2924½, as added by St.1933, p. 1674).

2. Constitutional law ⇐115

Economic necessity, while it may furnish reason for passage of law, will not place law beyond reach of constitutional guaranties concerning obligations of contract (Const.U. S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

3. Constitutional law ⇐115

Obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them, and impairment has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights, "obligation of a contract" being the law which binds parties to perform their agreement (Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

[Ed. Note.—For other definitions of "Obligation of Contract," see Words & Phrases.]

4. Contracts ⇐167

State laws existing when contract is made, which affect parties' rights, enter into and become part of contract, and are as obligatory on all courts which assume to give remedy on such contracts as if they were referred to or incorporated in terms of contract.

5. Constitutional law ⇐169

Remedy, where it affects substantial rights, is included in term "obligation of a contract," and remedy cannot be altered so as to materially impair such obligation (Const. U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

6. Constitutional law ⇐168

Right to proceed against debtor where security is inadequate cannot be taken from creditor without providing some equally effective remedy or imposing reasonable conditions for extension of time given (Const.U. S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

7. Constitutional law ⇐168
Mortgages ⇐559(2)

Statute precluding deficiency judgment on mortgage or trust deed obligation unless notice of breach and election to sell was recorded one year before sale, would be invalid as impairing obligations of contract, if retroactively applied (Civ.Code, § 2924½, as added by St.1933, p. 1674; Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

8. Constitutional law ⇐168

Legislature may not, under pretense of regulating procedure or rules of evidence, deprive party of substantive right, such as a good cause of action, or an absolute or substantial defense which existed theretofore (Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by A. G. Brown against James M. Ferdon and another. From a judgment for defendants on the pleadings, plaintiff appeals.

Reversed.

Prior opinion, 46 P.(2d) 218.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Freston & Files, Ralph E. Lewis, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

Frank P. Doherty, William R. Gallagher, W. C. Shelton, and George W. Burch, Jr.,

all of Los Angeles, Halbert & Stone and Sherrill Halbert, all of Porterville, and L. M. Cahill and James McKnight, both of Los Angeles, for respondents.

White, Miller, Needham, Harber & Mering, of Sacramento, amici curiæ.

WASTE, Chief Justice.

This cause was taken over after decision in the District Court of Appeal, Second Appellate District, Division 1, not because of any dissatisfaction with the opinion therein prepared by Mr. Justice Edmonds, sitting pro tempore, but in order to permit this court to more fully consider the important question of law involved. Following examination of the record and the pertinent authorities, we are of the view that the opinion above referred to correctly disposes of the issue presented, and we therefore adopt it as and for the decision of this court. It reads:

This action was brought to recover the deficiency remaining unpaid upon a note originally secured by a deed of trust after sale of the property thereunder upon default in payment. The note and deed of trust were executed in 1930, and the sale was made after the effective date of section 2924½ of the Civil Code, passed in 1933 (St. 1933, p. 1674), which provides: "No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1935, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale." The trial court granted the defendants' motion for judgment on the pleadings, and the sole question presented on appeal is the constitutionality of the quoted law as applying to instruments executed before its effective date.

If the law is to be applied retroactively, then the payee of a trust deed note must either waive his right to a deficiency judgment against the maker, or he must wait nine months longer than he was formerly required to do before the trustee may sell the property to satisfy the debt. It is contended by the appellant that if this law so applies, it impairs the obligations of contract within the meaning of the federal and state constitutional provisions prohibiting such legislation (Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16). The contrary view urged by the respondents is that the law is emergency legislation justified by the economic situation through which the country has passed, and that its constitutionality is sustainable upon the authority of Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 237, 78 L.Ed. 413, 88 A.L.R. 1481, in which case the Supreme Court of the United States upheld the Minnesota Moratorium Law.

[1, 2] While the law here challenged makes no reference to the necessity for its passage, in view of the fact that it is effective by its terms "to and until September 1, 1936," we may take judicial notice of the economic difficulties of the times and hold it to be emergency legislation. However, while economic necessity may furnish the reason for the passage of a law by the Legislature, that necessity will not place it beyond the reach of the constitutional guaranties concerning the obligations of contract.

[3] As was pointed out by Chief Justice Hughes in the Blaisdell Case, supra: "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (Sturges v. Crowninshield, supra, 4 Wheat. [122] 197, 198, 4 L.Ed. 529 [549]) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights." He also said (290 U.S. 398, pages 429, 430, 54 S.Ct. 231, 237, 78 L. Ed. 413, 88 A.L.R. 1481): "The obligation of a contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat. [122] 197, 4 L.Ed. 529 [549]; Story, op. cit., § 1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against in-

vasion.' Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552, 18 L.Ed. 403 [408, 409]. See, also, Walker v. Whitehead, 16 Wall. 314, 317, 21 L.Ed. 357 [358]. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. Sturges v. Crowninshield, supra, 4 Wheat. [122] 200, 4 L.Ed. 529 [550]. Said he: 'The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in Von Hoffman v. City of Quincy, supra, 4 Wall. [535] 553, 554, 18 L.Ed. 403 [409, 410], the general statement above quoted was limited by the further observation that 'it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired.'"

Under the law existing at the time the note here sued upon was made, upon default the creditor could require the trustee to sell the property in satisfaction of the debt after three months' notice. He might then sue the maker of the note and obtain judgment for any deficiency remaining after crediting the proceeds of the sale upon the indebtedness. If the note comes within the provisions of the new law, the right to a deficiency judgment has either been entirely taken away from the creditor, or he must wait an additional period of nine months before he may have judgment. These are substantial rights which are either entirely abrogated or suspended, and the fact that this is accomplished by legislation which has to do with the remedy rather than the substance of the contract is not controlling.

[4, 5] "It is settled that all the laws of a state existing at the time a contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract. Von Hoffman v. City of Quincy, 4 Wall. [535] 550, 18 L.Ed. 403; Brine v. Hartford Fire Ins. Co., 96 U.S. 627, 24 L.Ed. 858. The remedy, where it affects substantial rights, is included in the terms 'obligation of a contract,' and the remedy cannot be altered so as to materially impair such obligation. Green v. Biddle, 8 Wheat. [1] 75, 5 L.Ed. 547; Edwards v. Kearzey, 96 U.S. [595] 600, 24 L.Ed. 793. In the latter case it is said: 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest.' * * * In the late case of Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93, the principle is fully discussed, and it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. The court, after citing many cases, said: 'It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract.'" Welsh v. Cross, 146 Cal. 621, 624, 628, 81 P. 229, 230, 106 Am.St.Rep. 63, 2 Ann.Cas. 796.

[6, 7] For these reasons the right of the creditor to proceed against his debtor where the security is inadequate cannot be taken from him without providing some equally effective remedy or imposing reasonable conditions for the extension of time given. The act in question does not attempt to provide any substitute for the existing right. It either takes away the right to bring the action to judgment, or postpones that right for nine months. It is not, therefore, a statute of limitation, which fixes the latest time within which an action may be brought, and the law governing such statutes does not apply. And its provisions are substantially different in principle from those of the Minnesota Mortgage Moratorium Law.

The extension of time authorized under the Minnesota law does not automatically run in favor of every debtor, but may only be had upon conditions fixed by a court after judicial ascertainment of what is

fair to both debtor and creditor under the conditions existing in each case and only where the debtor pays the rental value of the property as fixed by the court upon notice and hearing. The amount so paid is applicable to taxes and insurance, as well as interest upon the indebtedness. Also, the extended period allowed for redemption of the property may be changed by the court as circumstances change. In considering the constitutional basis for this law, the Supreme Court said in the Blaisdell Case, 290 U.S. 398, 440, 54 S.Ct. 231, 241, 78 L.Ed. 413, 88 A.L.R. 1481: "Whatever doubt there may have been that the protective power of the state, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595."

This "temporary and conditional restraint," the court held, "in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions." Those conditions it found reasonable. "Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state's protective power, this legislation is clearly so reasonable as to be within the legislative competency." Home Building & Loan Association v. Blaisdell, supra, 290 U.S. 398, page 447, 54 S.Ct. 231, 241, 78 L.Ed. 413, 88 A.L.R. 1481.

That the Minnesota law was sustained upon the sole ground that it extended the period of redemption upon reasonable conditions considerate of the rights of both debtor and creditor is evident from the later case of Worthen Co. v. Thomas, 292 U.S. 426, 54 S.Ct. 816, 818, 78 L.Ed. 1344, 1347, 93 A.L.R. 173, where the Blaisdell decision was commented upon, as follows: "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the Blaisdell Case, we sustained the Minnesota Mortgage Moratorium Law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed." To the same effect see Worthern Co. v. Kavanaugh, 295 U.S. 56, 55 S. Ct. 555, 79 L.Ed. 1298, 97 A.L.R. 905.

While the act here being considered is limited in time, it fixes no conditions whatever for its operation. It purports to give relief to every debtor, irrespective of the amount of the indebtedness, the condition of the security, or his need for additional time. It imposes no condition upon the debtor in connection with the use and occupation of the property. It gives no opportunity for an inquiry into the situation of the respective parties and provides no forum for the creditor to present the situation from his standpoint. It simply gives a debtor a preference without any consideration of the rights of the creditor, and it cannot be sustained under our Constitutions. Shouse v. Quinley, (Cal.Sup.) 45 P.(2d) 701. See, also, Islais Co. v. Matheson (Cal.Sup.) 45 P.(2d) 326.

[8] In a very recent case, Morris v. Pacific Electric Ry. Co., 2 Cal.(2d) 764, 43 P.(2d) 276, 277, the Supreme Court said that "the Legislature may not, under pretense of regulating procedure or rules of evidence, deprive a party of a substan-

tive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore. Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327."

As intimated above, the Code section under consideration is general in its application, and is not confined to purchase-money obligations or to those involving homes or properties occupied by the debtor. On the contrary, it applies to all ordinary commercial transactions in which the debtor has borrowed money for purposes of his own and secured his promise to repay by trust deed upon real property. If retroactively applied, it clearly prefers the debtor over the creditor. Such preferment is not conditional, but absolute, and is accorded without regard to the actual needs or desires of the parties. It is granted without reference to individual circumstances, but as a matter of course in all cases, irrespective of and without examination into the equities of the situation. This is a far cry from the limitations placed upon a proper exercise of the reserve power of the state by the opinions in the Blaisdell and Worthen Cases, supra.

We fail to perceive wherein petitioners may gain any comfort from our recent decision in the case of Lincoln v. Superior Court, 2 Cal.(2d) 127, 39 P.(2d) 405, 406 wherein we held that section 725a of the Code of Civil Procedure, as added by St. 1933, p. 1673, § 7, permitting judicial foreclosure of trust deeds, may be applied retroactively to trust deeds executed prior to the enactment of the section. In so concluding, we held that the cited section "is a remedial statute which merely affords a new and additional means of enforcing a right." Our opinion in the cited case goes on to point out that under section 725a, supra, "The respective rights of the trustor and beneficiary are neither increased nor diminished by the section. It does not enlarge the obligation assumed by the trustor, but only enables the trustee or beneficiary to compel the performance of that obligation. In other words, the right of the beneficiary to have the property sold in the event of default remains as at the time the contract was executed, while the right of the trustor to have the property reconveyed to him upon satisfying the debt obligation, to secure which the property was conveyed to the trustee, is in no way affected by the section. Without any further condition than that specified in the trust deed, viz. satisfaction of the debt obligation, the trustor has the right to have the property reconveyed to him."

In so concluding, we had definitely in mind that the remedy by way of judicial foreclosure, provided in section 725a, was to be employed at the election of the creditor or trustee, and was merely cumulative of and in addition to the remedy by trustee's sale, without in any manner increasing the obligations or burdens of the debtor. As stated in the Lincoln Case, it merely afforded "a new and additional means of enforcing an existing right * * * the right of the beneficiary to have the property sold in the event of default remains as at the time the contract was executed." In view of this, we cannot accept the contention that the alteration or impairment of a substantive right, which results from a retroactive application of section 2924½, is compensated for by the existence of a right to a deficiency judgment in the event of judicial foreclosure under section 725a, enacted at the same time. The effect of this contention, under the circumstances here involved, would be to substitute the remedy of judicial foreclosure for that of a trustee's sale. However, had a legislative attempt been made to substitute such remedy for the remedy by trustee's sale, section 725a could not have been constitutionally applied retroactively for, contrary to the rule of the Blaisdell and Worthen Cases, it would have unconditionally deprived the creditor of the substantive right, given him at the time of the execution of the trust deed, to procure an indefeasible title (Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.(2d) 940), together with the right to a deficiency judgment, if necessary, at the expiration of three months from the recording of the notice of breach and election to sell. The remedy of judicial foreclosure, authorized by section 725a, with its accompanying period of redemption reserved to the debtor, would not give to the creditor at the expiration of three months an indefeasible legal title capable of immediate transfer. We cannot hold, therefore, that the latter remedy, with its provision for a deficiency judgment, is equally effective and no more burdensome than the creditor's original remedy by way of trustee's sale.

Thus the contention now under consideration, if accepted, would work a

change in the substantive rights of the creditor under the guise of a change in remedy. That this cannot be done is recognized in the Lincoln Case, supra, wherein we stated that "the existing remedy cannot be so altered as to take away or impair any of the rights given by the contract." Particularly is this so, when we keep in mind that section 725a apparently is a permanent addition to our law which was not enacted for a limited period in the exercise of the reserve power of the state, as that power is defined and limited in the Blaisdell and Worthen Cases.

Section 2924½ of the Civil Code, involved in the present case, falls afoul of the rule last above referred to for, as already shown, if applied retroactively the effect is to unconditionally take away or impair the right to a deficiency judgment as the same existed at the time of the execution of the trust deed, irrespective of the equities or the situation of the parties.

The judgment is reversed.

We concur: SHENK, J; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

LANGDON, J., not having been present at the hearing of the argument, and CONREY, J., being disqualified, neither of them participates in deciding the cause.

5 Cal.2d 782

BANKERS LIFE CO. v. CANTERBURY et al.

L. A. 15293.

Supreme Court of California.

Jan. 28, 1936.

Constitutional law ⊂⊃168
Mortgages ⊂⊃559(2)

Statute precluding entry of deficiency judgment on mortgage or trust deed obligation unless one year, as distinguished from former period of three months, has elapsed between recordation of notice of breach and election to sell and date of sale cannot be retroactively applied (Civ.Code, § 2924½, as added by St.1933, p. 1674; Const. art. 1, § 16).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Bankers Life Company against J. R. Canterbury, Jr., and another. From an adverse judgment, plaintiff appeals.

Judgment reversed.

Prior opinion, 50 P.(2d) 83.

Norman T. Mason, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondents.

PER CURIAM.

The sole question involved in this appeal is whether section 2924½ of the Civil Code, enacted in 1933 (St.1933, p. 1674), which section precludes the entry of a deficiency judgment unless one year, as distinguished from the former period of three months, has elapsed between the recordation of the notice of breach and election to sell and the date of sale under a deed of trust, may be applied to deeds of trust executed prior to the effective date of the section. The trial court, by sustaining a demurrer to the complaint without leave to amend, concluded that the section should be given a retroactive application. This is contrary to our decision in Brown v. Ferdon, 54 P.(2d) 712, this day filed, wherein we held that the section could not be retroactively applied without doing violence to the "contract clause" of the Constitution (article 1, § 16).

For the reasons advanced in Brown v. Ferdon, supra, and upon the authority thereof, the judgment herein is reversed.

5 Cal.2d 783

HAMMOND et al. v. STANLEY et al.

L. A. 15680.

Supreme Court of California.

Jan. 28, 1936.

Constitutional law ⇐168
Mortgages ⇐559(2)

Statute precluding entry of deficiency judgment on mortgage or trust deed obligation unless one year, as distinguished from former period of three months, has elapsed between recordation of notice of breach and election to sell and date of sale cannot be retroactively applied (Civ.Code, § 2924½, as added by St.1933, p. 1674; Const. art. 1, § 16).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Karl R. Hammond and another against Rowland P. Stanley and another. From an adverse judgment, plaintiffs appeal.

Judgment reversed.

Voorhees & Voorhees, of Los Angeles, for appellants.

George W. Burch, Jr., of Los Angeles, for respondents.

PER CURIAM.

The sole question involved in this appeal is whether section 2924½ of the Civil Code, enacted in 1933 (St.1933, p. 1674), which section precludes the entry of a deficiency judgment unless one year, as distinguished from the former period of three months, has elapsed between the recordation of the notice of breach and election to sell and the date of sale under a deed of trust, may be applied to deeds of trust executed prior to the effective date of the section. The trial court, by sustaining a demurrer to the complaint without leave to amend, concluded that the section should be given a retroactive application. This is contrary to our decision in Brown v. Ferdon, 54 P.(2d) 712, this day filed, wherein we held that the section could not be retroactively applied without doing violence to the "contract clause" of the Constitution (article 1, § 16).

For the reasons advanced in Brown v. Ferdon, supra, and upon the authority thereof, the judgment herein is reversed.

5 Cal.2d 237

CENTRAL BANK OF OAKLAND v. PROCTOR et al.

S. F. 15599.

Supreme Court of California.

Jan. 28, 1936.

1. Constitutional law ⇐168
Mortgages ⇐559(2)

Statute precluding entry of deficiency judgment on mortgage or trust deed obligation unless one year, as distinguished from former period of three months, has elapsed between recordation of notice of breach and election to sell and date of sale cannot be retroactively applied (Civ.Code, § 2924½, as added by St.1933, p. 1674; Const. art. 1, § 16).

2. Mortgages ⇐561

In action for deficiency judgment after trustee's sale, statute providing for procedural changes and creating added rights which was not expressly made retroactive *held* not retroactive, and hence evidence regarding market value of property, admission of which depended upon retroactive nature of statute, was properly excluded (Code Civ.Proc. § 580a as added by St.1933, p. 1672).

3. Mortgages ⇐556

Deed of trust which contained no expression that payment from trustee's sale would be accepted in full settlement of obligation and recited that grantee should apply proceeds first to expense of sale and then to note and any balance should go to grantor *held* not to show that parties agreed to accept proceeds of sale as payment in full.

4. Mortgages ⇐561

In action for deficiency judgment, evidence that mortgagor whose payments were in default directed that moneys received from mortgaged property be paid to mortgagee to be credited on account due mortgagee under original contract *held* not to show modification of original contract between parties.

5. Mortgages ⇐561

In action for deficiency judgment, error in admitting ledger sheet where there was no proper foundation laid *held* not prejudicial where sheet showed only amount of loan which was admitted by pleadings and amount of expenses of trustee's sale, and disbursement thereof which witness who procured ledger sheet testified he personally made.

6. Mortgages ⇐561

In action for deficiency judgment, burden was upon mortgagors to show payments made by them.

7. Mortgages ⇐561

In action for deficiency judgment, where pleadings presented no question of fraud, Su-

preme Court *held* not required to consider whether fraud was committed in obtaining signature of mortgagor who contended she signed note and trust deed merely for purpose of subjecting her community interest and without intention to become personally liable.

8. Husband and wife ⇐267(5)

In absence of provision contained in trust deed or note limiting her liability, trial court properly excluded, in deficiency judgment action, proof that mortgagor signed note and trust deed merely for purpose of subjecting her community interest, if any, in realty involved.

9. Mortgages ⇐408

Payment by mortgagors to former trustee named in trust deed of certain amount after notice of default was recorded and after mortgagors were notified that arrangement which had been made for payment of rents from mortgaged property to mortgagee was terminated *held* not waiver by mortgagee of default, where payments were to be made directly to mortgagee and mortgagors relied merely on fact payment was made to former trustee under trust deed.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Central Bank of Oakland against Frank H. Proctor and another. From an adverse judgment, the defendants appeal.

Judgment affirmed.

Prior opinion, 51 P.(2d) 157.

John T. Wentz and Booth B. Goodman, both of Oakland, for appellants.

Russell H. Pray and John F. McCarthy, both of Long Beach, and Lionel B. Benas, of Oakland, amici curiæ.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM.

[1] This cause was taken over after decision in the District Court of Appeal, First Appellate District, Division 2, because one of the issues involved herein, viz., whether section 2924½ of the Civil Code, enacted in 1933 (St.1933, p. 1674), which section precludes the entry of a deficiency judgment unless one year, as distinguished from the former period of three months, has elapsed between the recordation of the notice of breach and election to sell and the date of sale under a deed of of trust, may be applied to deeds of trust, executed prior to the effective date of the section. The trial court and the District Court of Appeal concluded that the section should not be applied retroactively. This is in accord with our decision in Brown v. Ferdon, 54 P.(2d) 712, this day filed, wherein we held that the section could not be retroactively applied without doing violence to the "contract clause" of the Constitution (article 1, § 16). The decision in Brown v. Ferdon, supra, is determinative of the question in the instant case.

[2] During the trial the defendants, relying on the provisions of section 580a of the Code of Civil Procedure, also enacted in 1933 (St.1933, p. 1672), sought to introduce evidence regarding the market value of the property described in the deed of trust at the date of sale. The evidence was excluded. We find no error in the rulings thereon, for in Bennett v. Superior Court, 5 Cal.App.(2d) 13, 42 P.(2d) 80, hearing denied in this court, it was held that section 580a, supra, was without application to notes and deeds of trust antedating its enactment.

We adopt the remaining portions of the opinion prepared in the District Court of Appeal by Mr. Justice Sturtevant as and for the decision of this court:

In an action to obtain a deficiency judgment after a sale had under a trust deed, the defendants have appealed.

The name of the plaintiff was formerly Central Savings Bank of Oakland, but prior to the commencement of this action its name was changed to Central Bank of Oakland. Heretofore the plaintiff loaned to the defendants $45,000, and in evidence thereof they executed their promissory note dated January 21, 1932. By the terms of the note, $100 was payable February 21, 1932, and $100 on the 21st day of each and every succeeding month thereafter until the 21st day of January, 1933, on which day the entire unpaid balance became due and payable. On the same day the note was made, the defendants, as grantors, executed to Central National Bank of Oakland a trust deed in favor of the plaintiff as beneficiary. By its terms the trust deed conveyed a lot in Oakland and the apartment house standing thereon. Interest was paid to the 15th day of July, 1932, and $9.21 on account of future interest. * * *

[3] The defendants contend that under the terms of the deed the plaintiff agreed to accept the proceeds of the sale as payment in full. Freely conceding that such a contract could have been made, nevertheless we think there is nothing in the deed that supports the contention of the defendants. The covenants contained in the deed on which the defendants base their contention are as follows: "And the grantee, or its successors or assigns, shall establish as one of the conditions of such sale, that all bids and payments for said property shall be made in like lawful money as aforesaid, and upon such sale it shall make, execute, and, after due payments made, shall deliver to the purchaser or purchasers, his or their heirs or assigns, a deed or deeds of the premises so sold, and shall apply the proceeds of sale thereof, in payment, firstly, of the expense of such sale, together with the reasonable expenses of this trust, including therein counsel fees, in lawful money, in an amount equal to five per cent of the amount secured hereby and remaining unpaid, which shall become due upon any default made by the said grantors in any of the payments aforesaid; and also such sums, if any, as said grantee, or said party of the third part shall have paid for procuring an abstract of, or for search of, the title to said premises, or any part thereof, subsequent to the execution of this Deed of Trust, and in payment, secondly, of the said promissory note—and of the amount of the principal and interest thereon then remaining unpaid, and the amount of all other moneys, with interest thereon, herein agreed or provided to be paid by the said grantors; and the balance or surplus of such proceeds of sale it shall pay to the said grantors, their heirs, executors, administrators or assigns." It will be noted that the covenant quoted contains no expression to the effect that the payments will be accepted "in full." On the other hand, the covenant does recite that the grantee "* * * shall apply the proceeds of sale thereof firstly, of the expense of such sale, together with the reasonable expenses of this trust. * * * " For the reasons stated, and others not necessary to state, we think that the contention of the defendants would in effect place a strained construction on the terms of the trust deed.

[4] In their amended answers the defendants set forth what purported to be contracts modifying the terms of the original contract. In effect the trial court held that no modified contract was proved. In so holding we think the trial court did not commit an error. On the 15th of March, 1933, the defendants were behind in their payments. The plaintiff was pressing them to comply with the terms of their contract. Thereupon the defendant Frank H. Proctor wrote a letter dated March 15, 1933, to Mr. C. J. Gates, who was in charge of the property for the defendants, to pay to Central National Bank all moneys received from the property less current expenses. On the same date he wrote a letter to Central National Bank, directing it to pay said moneys to plaintiff to be credited on account of interest, etc. Thereafter on April 10, 1933, Mr. Proctor sent copies of said letters to the plaintiff. No written document signed by the plaintiff or its agents touching the subject-matter was offered in evidence; however, the defendants sought to prove that Mr. C. D. Bowman, who was on said date assistant cashier of the plaintiff, made certain oral promises to the defendants. It will be observed that the amounts ordered paid to the plaintiff were moneys which the plaintiff was entitled to receive under and by virtue of the original contract. The source from which those moneys came was a matter of no concern to the plaintiff. The letters written by Mr. Proctor do not show on their face any promise made either orally or in writing by the plaintiff. If the defendants would claim that these transactions constituted a written contract, they failed to show any writing on the part of the plaintiff. The fact that the letters were signed by the defendants and not by the plaintiff did not establish a written contract. If they would claim that an executed oral agreement was made, such claim must fall for the proof shows that it was not executed. We think there was no evidence that the contract between the parties was modified. Rottman v. Hevener, 54 Cal.App. 474, 202 P. 329.

[5, 6] During the trial the plaintiff offered in evidence, and over the objection and exception of the defendants the trial court admitted, a ledger sheet. The objection of the defendants was that no proper foundation therefor was made. The objection was well founded, and it should have been sustained. Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657. It follows that it was error to admit the

sheet. However, the error was not prejudicial. On its face it showed the amount of the loan, $45,000. That item was admitted by the pleadings. It also showed the expenses, etc., of the trustee's sale and the disbursement thereof. The latter entries were made in the handwriting of Mr. Peterson, the witness on the stand, who produced the ledger sheet and who testified that he personally made the disbursements. On the card certain payments on the debt of the defendants were set forth. We do not understand the defendants to claim that said payments were not made. Furthermore the burden rested on the defendants to introduce evidence of and concerning payments made by them. It follows that admitting the ledger sheet was not a prejudicial error.

[7, 8] The defendant Flora MacD. Proctor offered to prove that she signed the note and deed of trust in the case at bar for a particular purpose and that T. A. Crellin, the executive vice president of the plaintiff bank, was advised and accepted her signature for the purpose of subjecting her community interest, if any she had, in the real property in question, and that she assumed no personal liability by the signing of said note or deed of trust, and that she should have been permitted to introduce that proof. Before going further, it should be noted that the pleadings presented no question of fraud; therefore it is not necessary to consider whether fraud was or was not committed. In the absence of any provision contained in the contract limiting her liability, we think that Mrs. Proctor may not complain of the court's ruling. Hammond Lumber Co. v. Danziger, 2 Cal.App.(2d) 197, 200, 37 P.(2d) 517.

[9] After the notice of default was recorded and after the defendants had been notified in a letter from the attorneys that the arrangement for the payment of the rent to the plaintiff was terminated, the defendants paid $868.19 to the Central National Bank of Oakland. The evidence shows affirmatively that said moneys were not paid to the plaintiff. Nevertheless the defendants complain because the trial court did not allow the jury to pass on the question as to whether such moneys had been paid to the plaintiff. The record shows nothing to the contrary but that the Central National Bank received and now holds the $868.19 on some obligation not germane to the instant litigation. As stated hereinabove, if the defendants claimed that said payments were made on the note dated January 21, 1932, and should have been applied thereto, the burden rested on them to show the facts. They neither did so nor offered to do so, but relied solely on the fact that Central National Bank of Oakland was at one time the trustee named in the trust deed. In that connection the evidence shows affirmatively that it ceased to be such trustee on April 21, 1933. However, by the terms of the contracts between the parties no covenant authorized payments due the plaintiff to be collected by the trustee; but the note provided that the principal and interest were payable to the plaintiff at its office, and by the terms of Mr. Proctor's letters the proceeds from the apartment house were to be credited only after they were received by the plaintiff. Under the foregoing facts we think it is clear that, after the notice of default, the plaintiff received no further payments from the defendants and did not waive the default, and furthermore that there was no evidence received or offered showing that a deficiency judgment was waived.

The judgment is affirmed.

11 Cal.App.2d 15

Sara ROSENBERG et al., Plaintiffs and Respondents, v. E. A. JANSSEN et al., Defendants and Appellants.

Civ. 9583.

Supreme Court of California.

Feb. 21, 1936.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Ivan N. Maroevich, of San Francisco, for appellants.

J. J. Posner, of San Francisco, for respondents.

PER CURIAM.

We are in accord with the conclusion announced in this cause by the District Court of Appeal of the First Appellate District, Division 1 (52 P.(2d) 952) and upon the authority of Brown v. Ferdon (Cal.Sup.) 54 P.(2d) 718, the petition for a hearing herein is denied.

5 Cal.2d 342

PEOPLE v. BOULTON.

Cr. 3875.

Supreme Court of California.

Feb. 18, 1936.

1. Homicide ⇐237, 238

Evidence *held* insufficient to show that defendant in murder prosecution did not, because of insanity or intoxication, know at time of homicide nature and quality of act with which he was charged and that it was wrong to commit it.

2. Homicide ⇐111

Contention of defendant charged with murder of peace officer not in uniform, who had arrested him after he had attempted to commit felony, that he was ignorant of officer's identity and believed that he had right to resist arrest *held* no defense, since he was charged with knowledge that private person might lawfully make such arrest (Pen.Code, § 837, subd. 3).

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

J. C. Boulton was convicted of murder in the first degree, and he appeals.

Affirmed.

Wesley E. Marten, of Chico, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., J. R. King, Jr., Dist. Atty., of Gridley, and P. Marcell Barceloux, Asst. Dist. Atty., of Chico, for the People.

SEAWELL, Justice.

The defendant was charged, by an information filed against him in the superior court of the county of Butte, with and convicted of the crime of murder of the first degree, committed by him in said county on October 20, 1934. The murder consisted of having stabbed, on October 20, 1934, A. D. Miner, a peace officer of the city of Gridley, county of Butte, who died four days later as the direct result of said knife wound inflicted by the defendant with homicidal intent. The jury did not by its verdict relieve the defendant of the extreme penalty of the law, and the court thereupon imposed the extreme penalty as it is required to do in cases where the jury refuses to exercise its discretion by relieving the defendant of the death penalty.

In addition to his plea of not guilty of the offense charged, he also entered a plea of not guilty of the offense charged because he was insane at the time it was alleged that he committed the crime. The jury found against the accused on both issues.

In due course the defendant moved for a new trial. The motion was denied and the death penalty was accordingly pronounced. Notice of appeal from the judgment of conviction was duly given by the attorney who conducted the defenses of not guilty of the offense charged and not guilty by reason of insanity. He took no steps to prosecute the appeal, which comes to us automatically, and we have before us the clerk's and the reporter's transcripts on appeal, but no briefs from either side. Nevertheless we have read the entire transcript of testimony, the clerk's transcript, including the court's instructions, and all papers constituting the record.

The facts of the homicide are briefly told. The defendant arrived in Gridley on the morning of October 20, 1934. He had lived a roving life. According to his own words he abandoned the occupation of his early manhood, that of carpenter, and for twelve years had made a livelihood beating the "punch board," which is a device as common in cigar stores and shop places as the slot machine. Shortly after eating his breakfast he met a wayfarer, and they fraternized during the day. He explained to the wayfarer, whom he referred to as a lumberjack, how he could beat the punch board. Taking his instructions, the lumberjack proceeded to a cigar store and by following the defendant's instructions won three cartons of cigarettes. The defendant purchased them for the sum of $2 and peddled them in packages to whomsoever would buy. He was called to account for his action and taken to the city hall by a peace officer, where he was questioned. He explained how he came into possession of the cigarettes and was released by the officer. The defendant's destination was Marysville. It seems that no transportation was available to his destination until late in the afternoon. He and his companion made the public park which adjoins the Southern Pacific Company's depot their stopping place. Early in the afternoon, as they were seated on a bench, a boy of about ten years of age and his playmates came into the park and began to play in boyish fashion. The defendant engaged them in conversation and entered into the sport

with the boys. The caretaker of the park, Joe Lopez, heard some suggestive words directed to the boy by the defendant which caused him to become suspicious of his real purposes. His first contact with the defendant had been some hours before, when the defendant offered to sell him a package of cigarettes and inquired as to the time the first conveyance left for Marysville. Lopez finally saw the defendant exhibit a piece of money to the boy and heard him ask if he would like to have the money. The boy went with him into the public toilet. Lopez heard the boy saying "No, no," soon after entering the toilet, and Lopez immediately reported the matter to Mr. Lalla, who 'phoned to the police headquarters, and Mr. A. D. Miner, a deputy sheriff and peace officer of Gridley, accompanied by Mr. Toney Soares, arrived upon the scene a very few minutes after the defendant and the boy entered the toilet. Mr. Miner grabbed the door knob, shook and beat against the door, and commanded the defendant to open it. The defendant first said "No," and then immediately thereafter replied, "Wait a minute," and gave a plausible reason for his presence in the toilet. Both the boy and defendant came out upon the order of Mr. Miner, and the defendant was seen buttoning up his trousers as he left the toilet. The boy was taken aside by the officer and upon being questioned said the man had offered him a dollar to be a party to an immoral act made punishable as a felony by statute. He said the defendant exposed his person to him, and he related to the officer the details of the act the defendant was attempting to accomplish. He told a damaging and convincing story against the defendant. The officer then accosted the defendant and told him to come with him, as he was under arrest. The defendant made some attempted explanation of the situation, but the officer said to him that he "didn't have to explain anything to him, he knew." The officer took him by one arm and Mr. Soares took him by the other and they walked him to the officers' automobile, which was parked in front of the Gridley Hotel. The defendant was placed on the back seat and Mr. Soares took a seat by his side. The boy sat by the side of Mr. Miner, who was at the wheel. The car was started and had not progressed but a few feet when the defendant, to the surprise of Soares, struck him a heavy blow in the stomach, saying, "Take that." He held a knife gripped in his hand, and the blade entered Soares' abdomen. Soares was temporarily stunned and disabled by the blow and knife thrust. The defendant, who was then upon his feet, reached forward and threw his left arm around Mr. Miner's neck and struck him a terrific blow with the open knife, the blade of which entered about one-half inch below the right nipple, cutting a wound five inches in length and extending into the chest cavity. The defendant was finally overpowered by bystanders, and the knife fell from his hand to the pavement. Blood gushed in a stream from the gaping wound. A physician was summoned at once, but it was quite impossible to completely staunch the flow of blood. Specialists from San Francisco and physicians from Gridley and nearby cities were called on the case, but it seemed from the first that the wound was mortal and Mr. Miner died from the immediate effects of the wound on the fourth day thereafter. He grew progressively weaker from the first. That the knife thrust was the immediate cause of death is not even a debatable question.

Upon being questioned a little while after the cutting as to why he had cut Mr. Miner, defendant replied, "I don't give a damn. I will cut your guts out too." Afterwards he told Deputy Sheriff Heimburger that he cut the men "because they tried to arrest him without any reason and that he would do it again."

After Mr. Miner had been cut, Constable Elliott undertook to remove him from the Gridley city prison to the county jail at Oroville. Deputy Sheriff Frazier was to accompany him. The defendant was handcuffed and seated on the front seat with Mr. Elliott. Mr. Frazier was seated on the rear seat. Before they had left the city limits Mr. Elliott called to Mr. Frazier that the defendant had thrust a knife blade into his side and was bearing down on the knife handle. Mr. Frazier had a pistol on the seat and he struck the defendant five or six times on the head and he finally loosed his hold on the knife. Mr. Frazier's finger was also cut in the struggle. While Mr. Elliott and Mr. Frazier were engaged in the struggle to subdue the defendant the automobile, being out of control, "side-swiped" two other cars, ending up in a crippled condition. Another was pressed into service and the defendant was delivered to the sheriff at Oroville.

[1] The evidence as to the homicide is without contradiction. Several eyewitnesses testified in the case. There is no substantial evidence in the record which would

justify a finding that the defendant was suffering from settled insanity. An examination of his testimony will show that he is a man of at least, if not above, average intelligence. He seemed quite mentally alert, exhibited powers of discernment and reasoned logically. His attempt to show congenital insanity was not impressive. He knew nothing personally of any mental disturbance existing in either branch of his parents' families, but testified that he understood that his father was afflicted with senile dementia and his mother had suffered mental disturbances during her menopause state, neither of which conditions, if proved satisfactorily, would necessarily indicate inherited insanity. He also testified that his uncle had killed his own father and had been adjudged insane. He also stated that at one period in his life he felt that he was "seeing things" and he surrendered himself to an institution for the care of the insane, but that he was soon released and has not since experienced any mental disturbances. His testimony on the issue of congenital insanity is very weak, as nothing of substance was proved by positive or convincing evidence. Two physicians were called to testify as to the sanity of the defendant, one being a psychiatrist and superintendent of the Agnew State Hospital for the insane and the other a physician selected by the court. Both experts, upon thorough physical and mental examinations and tests made by them, gave it as their opinion that the defendant was sane at the time he struck the fatal blow. The superintendent of the Agnew State Hospital testified that the defendant manifested no symptoms whatsoever that would indicate that he was or had been at any time insane.

The theory of the defense was twofold: First, that the mind of the defendant had been affected by intoxicating liquor which he had drunk at midday at Gridley to the extent that he was not conscious of the act he had committed; and, second, if he was conscious as to what he was doing, he believed the officers, who were not in uniform, were not in fact officers and he believed that he had a right to resist being forcibly thrust into the automobile.

We will first briefly consider the temporary unconscious period into which the defendant claims he lapsed. His testimony is that he was not addicted to the habitual use of intoxicating liquors. He contends that an hour or two after arriving in Gridley he drank a few glasses of beer and thereafter, and while in the public park in company with his companion, at least two pints of whisky were consumed by the two. He claims that the liquor was purchased by his companion with the money which he received from the sale of the cigarettes. The only evidence as to intoxication comes from the defendant. There is, however, testimony given by one witness to the effect that the defendant and his companion were seen to withdraw from the bench which they were occupying and become lost to sight among boxcars in the switching yards. The defendant claims that he partook freely of the liquor so furnished. Five or six persons, including several peace officers, testified that they were in close contact with the defendant for a considerable time after he was in custody and they did not detect the odor of liquor on his breath. They also testified that his movements did not indicate that he was affected with intoxicating liquor. The only witness who testified to the odor of liquor was the sheriff who received the defendant at the county jail some hours after he had done the cutting. He said that he detected the smell of liquor on his breath at the time he was delivered to him and he was unable to engage him in conversation. The inference from his testimony is that the defendant appeared to be unable to converse rationally, or that he refused to talk at all. He left the matter in doubt. The viciousness of the assaults and the cruelty with which they were committed, standing alone, appear to be the inexplicable acts of a maniac or madman. But when weighed with the fact that the defendant must have been conscious that he was to face a felony accusation of a very serious character there appears to be "some method in his madness." The fact that he struck Soares a heavy blow with the knife and accompanied it with the vile epithet, "Take that, you ———" and thereafter stated that he had cut the men "because they tried to arrest him without any reason, and he would do it again," is rather satisfactory evidence as to his consciousness as to what he was doing. The fact that he said to the constable at the time of his release after being investigated as to his possession of the cartons of cigarettes, "You are a square officer," also strengthens the conclusion that he had the ability to reason and appreciate the things which affected his personal interests.

The two experts who testified in the case expressed the unqualified opinion that the defendant knew the nature and the quality of the act with which he was charged and

knew that it was wrong to commit it. Such is the legal test as to mental responsibility.

[2] The claim of the defendant that he was not aware that the officers who had arrested him were in fact officers is dissipated by the circumstances of the case. He knew that he had attempted to commit a felony, and the law charged him with the knowledge that a private person may lawfully arrest another "when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Subdivision 3, § 837, Pen.Code. But aside from this provision of the Code, there is good reason to believe that the defendant knew that Mr. Miner was an officer.

We have examined the instructions given and find them very complete and fair. The trial judge, with commendable care, stressed every phase of the law that was favorable to the defendant. The case was as well presented by defendant's counsel as it was possible, in the light of the facts, to present it.

Judgment affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.



5 Cal.2d 361

NICHOLSON v. CITY OF LOS ANGELES.

L. A. 15601.

Supreme Court of California.

Feb. 20, 1936.

1. Municipal corporations ⇐817(1)

To recover from municipality for injuries resulting from defective condition of street, it must be proved that municipality had notice of defect and failed to remedy it (St.1923, p. 675, § 2).

2. Municipal corporations ⇐791(1)

Mere existence of minor defect in sidewalk is not such constructive notice of defect as will render municipality liable for injuries resulting therefrom, but there must be some element of conspicuousness which will put municipal authorities upon inquiry as to existence of defect and its dangerous character (St.1923, p. 675, § 2; Civ.Code, § 19).

3. Municipal corporations ⇐791(1)

To charge city with constructive notice of defect in street on ground of duty to inspect, it must appear that reasonable inspection would have disclosed defect or dangerous condition a sufficient time before accident to have given municipality reasonable opportunity to guard against injury therefrom (St. 1923, p. 675, § 2; Civ.Code, § 19).

4. Municipal corporations ⇐755(1)

Municipality is not an insurer of its public ways, and is not bound to keep them so as to preclude the possibility of injury or accident.

5. Municipal corporations ⇐819(6)

Evidence that sidewalk block had been 1½ inches higher than rest of walk for several months *held* insufficient to show that municipality had such constructive notice of defect as would permit pedestrian to recover for injuries sustained therefrom (St.1923, p. 675, § 2; Civ.Code, § 19).

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Hattie Nicholson against the City of Los Angeles, a municipal corporation. From a judgment for the plaintiff, defendant appeals.

Reversed.

Prior opinion, 48 P.(2d) 986.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for appellant.

Avery M. Blount and Marion P. Betty, both of Los Angeles, for respondent.

Rodney Johnson, of Los Angeles, for defendant William B. Wyatt.

Martinelli & Gardiner, Jordan L. Martinelli, and Samuel W. Gardiner, all of San Rafael, amici curiæ.

THOMPSON, Justice.

This is an appeal by the defendant city of Los Angeles from a judgment awarding the plaintiff damages in the sum of $1,800 for injuries sustained when she slipped and fell on a public sidewalk. The defendant Wyatt, the owner of the property, in front of which the plaintiff met with her accident, received a judgment of nonsuit and is not involved in this appeal.

The accident occurred at approximately 10 o'clock in the morning on January 19, 1934. The sidewalk on Second avenue had cracked at one of the joints between the panels. One block had tilted up so that there was a difference in grade at the break of not more, and possibly less, than an inch and a half. The plaintiff approached from the north, which was the high side of the break, set her heel on the edge of the break, and slipped and fell, suffering the injuries complained of. The court found that this condition was dangerous and constituted a menace to pedestrians using the sidewalk; that the defendant had negligently permitted the dangerous condition to exist without repair for several months prior to January 19, 1934; that the plaintiff was exercising ordinary and reasonable care, and was without knowledge of the dangerous condition of the sidewalk, and by reason of the defect stumbled and fell.

Liability is sought to be imposed upon the defendant city under the Public Liability Act of 1923 (Stats.1923, p. 675, Deering's Gen.Laws 1931, Act 5619), section 2 of which renders the city liable for "injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where * * * the board, officer or person having authority to remedy such condition, *had knowledge or notice of the defective * * * condition * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.*" (Italics added.) This statute constitutes a modification of the rule of nonliability of municipalities for acts performed in a governmental capacity, and recovery thereunder is only possible where all the requirements conditioning the city's liability are supplied. It is not enough to show a dangerous condition of the property. "The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery." Watson v. City of Alameda, 219 Cal. 331, 26 P.(2d) 286, 287. See, also, Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.(2d) 846, and Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768.

[1-3] Assuming that the evidence will support the finding of a dangerous and defective condition by reason of the break and elevation in the concrete surface of the sidewalk, it clearly will not support the finding that "the defendant had constructive notice of the said condition of said sidewalk for several months prior to January 19, 1934, and for at least three months prior thereto." No attempt has been made to charge the city with actual notice, but respondent relies entirely upon constructive notice arising from the continued existence of this defect through a period described by plaintiff's witness as "several months." Even though it be true as said in Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, and Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643, that a minor defect may well be dangerous to travel, it does not, we think, by its mere existence, charge the city with constructive notice of its presence.

Constructive notice ordinarily involves, as an essential element, actual notice of facts or circumstances which are sufficient to put a prudent person on inquiry as to the existence of the fact with respect to which he is charged with constructive notice. It is so provided in our Code definition. Civ.Code, § 19. In Wilkerson v. Thorp, 128 Cal. 221, 60 P. 679, 681, which is illustrative of this principle, it was held that knowledge of the existence of a lease did not charge with constructive notice of unusual provisions contained therein, although it constituted constructive notice of provisions customarily contained in leases. It is there said: "Constructive notice is a knowledge of such facts that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proven to have come to his knowledge. The information or knowledge of facts possessed by a party must be such that he is conclusively presumed to have notice of the main fact to which the constructive notice is invoked." Consequently there must be shown, in order to charge the city with constructive no-

tice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that, where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that, had there been no neglect of duty, there would have been actual knowledge on the part of the city officers.

[4] Under the rule contended for by respondent, the mere existence of a defect, no matter how slight or obscure, for a substantial period of time, would be sufficient to charge the city with notice and render it liable for injuries received on account thereof. It is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident. In Taylor v. Manson, 9 Cal.App. 382, 392, 99 P. 410, 415, it is said: "It is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist, not only in the city and county of San Francisco, but in all cities. In many instances a wooden or concrete pavement will terminate, and the sidewalk then consist of the surface of the street, and there will be a step of a few inches depression from the artificial sidewalk to the earth. In many cases there is, even in paved sidewalks, a drop of a few inches in the surface. In fact the drop from the curb or outer edge of almost every sidewalk is from 3 to 4 inches, or several inches, and it is not usual for the surface to be on a level with the surface of the street. While a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities." See, also, McQuillan on Municipal Corporations, vol. 7, p. 164, § 2974, and Dillon on Municipal Corporations (5th Ed.) vol. 4, p. 2965, § 1697. The doctrine of constructive notice cannot be so applied as to effect a change in the substantive obligations of the city.

The rule as stated in the cases relied upon by the respondent is that the existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice. Consideration of the facts of those cases, however, discloses that there was in each instance a more conspicuous defect than the one in the instant case, or there was present an additional factor upon which the constructive notice was predicated. In many there was actual notice, and hence the language with reference to constructive notice is mere dictum. In none was the municipality charged with constructive notice upon the basis of the mere existence of a minor defect for a period of several months. In Boyce v. San Diego High School Dist., 215 Cal. 293, 10 P.(2d) 62 (pit in a corridor without a guard rail), Bennett v. Kings County, 124 Cal.App. 147, 12 P.(2d) 47 (bridge at a sharp angle with the highway without a guard rail, fence, or warning signs), and Dawson v. Tulare Union High School, 98 Cal.App. 138, 276 P. 424 (piano insecurely supported on a dolly), not only was the defect or dangerous condition more conspicuous, if not obvious and apparent, but there had been prior accidents from the same cause which served to put those in charge upon inquiry as to the safety of the existing condition. In Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, there was actual notice, an obvious defect in the form of a fifteen-inch step down from curb to street, all others being less than half that height, and a presumption of inspection which should have disclosed the condition arising from the acceptance by the city of the improvement, constructed under contract with the city. In Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052, the defect was distinctly more conspicuous, consisting of a gully across a sidewalk. Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353, and Kramer v. City of Los Angeles, 147 Cal. 668, 82 P. 334, did not necessitate a determination of the question of constructive notice, although both contain language to the effect that it may be predicated upon a failure to discharge the duty to inspect. In the first case a tree had fallen across a roadway, partially obstructing it, while the second involved the clogging of an outlet to a street drain shortly after a storm; the court stating that it was the duty of the city to anticipate the probability of such occurrences, that neglect of duty cannot be made the basis of exemption from liability. In Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643,

there was testimony that an inspection had been made during the existence of the defect found by the jury to be dangerous.

The plaintiff herself testified, and relies upon this testimony to show an absence of contributory negligence, that from the direction from which she approached the sidewalk appeared to be perfectly level. This testimony also tends to show that the defect was not conspicuous, and might also go far toward establishing that it might have been overlooked in a reasonable inspection of the city streets. The rule as to the duty to inspect has been well stated in Davanza v. City of Bridgeport, 118 Conn. 23, 170 A. 484, 485: "'In order to charge a municipality with implied or presumptive notice of a defect, it must be shown that, had it exercised a reasonable supervision over its streets and sidewalks, it would have discovered the condition a sufficient time before the accident to have had a reasonable opportunity to guard against injury from it. That test is * * * would it have been discovered had the municipality exercised reasonable supervision over its streets * * * in view of the whole problem with which it was confronted.' Ritter v. City of Shelton, 105 Conn. 447, 450, 135 A. 535, 537. This, in common with the other elements of municipal liability for defective streets and sidewalks, contemplates consideration of all the existing circumstances, including, not only the cause and nature of the defect and the length of time it had existed, but also the location, extent, and character of use of the walk in question, the magnitude of the problem of inspection, and remedy presented by the conditions, and the resources in men and money available to cope with the problem."

[5] There is no evidence of any prior event which would put the city on inquiry as to the existence of a dangerous break at this point, and aside from the testimony that it had existed for several months, that it was about an inch and one-half high, and that the plaintiff thought it was caused by the root of a tree growing in the parking beside it, there is no testimony with regard to the defect itself. This, we think, is insufficient to sustain a finding that, had the city fulfilled its duty of reasonable inspection and supervision of the streets of the city as a whole, it would have had actual knowledge of the break. There is a complete absence of proof as to the method or period of inspection or the nature of the neighborhood in which the defect existed or the character of the use made of the walks in this neighborhood. Because of the plaintiff's failure to bring home to the defendant city a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, the city cannot be held to have had constructive notice of the defect, and the judgment must be reversed.

Judgment reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.



11 Cal.App.2d 724

PEOPLE v. OWENS.

Cr. 188.

District Court of Appeal, Fourth District, California.

Feb. 17, 1936.

1. Rape ⇐51(4)

Evidence *held* to sustain forcible rape conviction.

2. Criminal law ⇐1036(1)

In prosecutions for forcible rape and committing sexual perversion, admission of testimony of prosecutrix' father, in reply to question as to what was prosecutrix' complaint to him, that prosecutrix accused defendant as guilty party, *held* not reversible error, where no objection was made to question (Pen.Code, § 288a).

3. Criminal law ⇐1120(6)

In prosecutions for forcible rape and committing sexual perversion, alleged erroneous exclusion of testimony would not be considered, where it was not possible to tell from record whether or not matter excluded had any bearing on case or was of any importance (Pen.Code, § 288a).

4. Criminal law ⇐511(2)

Testimony of accomplice is corroborated by evidence which, though slight, tends to connect defendant with commission of offense, even though all of precise facts are not established.

5. Criminal law ⇐511(4)

Evidence that defendant made statement to witness which connected defendant with

commission of sexual perversion, and that defendant endeavored to get witness to leave state and threatened to shoot him if he testified, and that defendant and prosecutrix were seen going to place where act was allegedly committed, *held* sufficient corroboration of accomplice testimony of prosecutrix (Pen.Code, § 288a).

6. Criminal law ⇐1037(1), 1129(1)

Alleged error in district attorney's statement which was not objected to or assigned as error could not be raised on appeal.

7. Criminal law ⇐719(3)

District attorney's statement, after summing up evidence and after referring to actions of defendant as shown by evidence, that defendant was guilty and that jury knew defendant was guilty, *held* not objectionable as conclusions of district attorney from his own investigation without reference to evidence produced in court.

8. Criminal law ⇐721(1)

District attorney's comment on fact that defendant accused of forcible rape and sexual perversion did not take stand *held* not prejudicial error (Pen.Code, § 288a; Const. art. 1, § 13, as amended in 1934).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Bert Owens was convicted of forcible rape and committing sexual perversion, and he appeals.

Affirmed.

Albert Peterson, of Hanford, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with forcible rape and, in a second count, with a violation of section 288a of the Penal Code. The jury found him guilty on both counts and the judgment provided that the two sentences should run concurrently. From that judgment this appeal is taken.

[1] With respect to the first count it is contended that the evidence is not sufficient to sustain the verdict. It is argued that the prosecuting witness was subnormal mentally, that her testimony contained conflicting statements, that portions of it are incredible, and that it appears that she was acting under the domination of her father. The record fails to sustain any of these contentions to an extent that would justify a reversal. While the prosecuting witness may not have been a model of intellectual strength, her testimony was clear and direct and indicates a considerable degree of intelligence and the same was corroborated in many respects. It is further argued that the evidence fails to show resistance on her part to the extent and in the degree required by law. The offenses are alleged to have been committed in a lonely spot in Kern county, in a rolling country some distance from the nearest habitation. The prosecuting witness testified that she resisted to the best of her ability, that she tried to run away and was dragged back, and the court submitted the issue to the jury under proper instructions. In view of all of the circumstances, including the lonely location, we see no good reason for disturbing the jury's finding on this question of fact.

[2] It is next contended that the court committed error in permitting the father of the prosecuting witness to testify as to a complaint made to him by her the first time she saw him after the offenses were committed. In particular, it is contended that this witness was permitted to give particulars of the complaint made by naming the appellant. The case of People v. Avila, 50 Cal.App. 228, 194 P. 768, is relied on in support of this contention. In that case the witness was specifically asked for the name of the person accused by the one making the complaint. In the instant case, an objection was sustained to a question as to the nature of the complaint made, on the ground that the question was too broad. The question was then asked: "What was her complaint?" No objection was made to this question and in reply thereto the witness voluntarily gave the name of the person accused. We find in this no sufficient ground for a reversal.

[3] It is next claimed that the court erred in excluding the testimony of a certain witness. While this witness was testifying an objection was made and sustained. Counsel for appellant then said: "Just a little incident I wanted to show." The matter was then dropped and no offer of proof was made. It is not possible to tell from the record whether or not the matter excluded had any bearing on the case or was of any importance.

[4, 5] The last two points are also raised in connection with the conviction on the second count and require no further consideration. It is also urged with reference to that count, that the prosecuting witness was an accomplice and that no corroboration appears. The court instructed the jury that corroboration was necessary. It is well settled that the corroboration which is required is not such as would establish all of the precise facts, but that it is sufficient if there be some evidence which, though slight, tends to connect the defendant with the commission of the offense. People v. Briley (Cal.App.) 48 P.(2d) 734. A statement made by this appellant to one of the witnesses tended to connect him with the commission of the offense. It also appears that the appellant endeavored to get this witness to leave the state and that he threatened to shoot him if he came to the trial as a witness. Several other witnesses testified to seeing the appellant and the prosecuting witness going toward the place where the offense is supposed to have occurred and, under the circumstances appearing, it must be held that the corroboration was sufficient.

[6, 7] It is claimed that the district attorney was guilty of misconduct in saying, near the close of his address to the jury: "I know you are guilty; this jury knows you are guilty." It is argued that, in effect, the district attorney was allowed to give his conclusions from his own investigation without reference to the evidence produced in court. Not only was this statement not objected to or assigned as error (People v. Harris, 219 Cal. 727, 28 P.(2d) 906), but we think the language used is not subject to the interpretation thus placed upon it. The district attorney had just finished summing up the evidence and after referring to the actions of the appellant, as shown by the evidence, he made the remark in question. While the statement should not have been made, it seems impossible that the jury could have taken it otherwise than as referring to the evidence which had been produced in court and as meaning that the district attorney and the jury had acquired their knowledge from the same source, namely, the evidence.

[8] The final point urged is that the district attorney committed prejudicial error by commenting on the fact that the appellant did not take the stand. The contention seems to be that the district attorney abused the privilege given by section 13, article 1, of the Constitution of California, as amended in 1934 (see St. 1935, p. xcv). We have read the comments referred to, which seem to us to be well within the spirit and intent of the constitutional amendment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 745

KING et al. v. CARROLL.

Civ. 10087.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1936.

1. Guaranty ⇐91

In payees' action on junior lienor's guaranty of secured note, evidence *held* to show that lienor's agreement with payees to purchase note on original maturity date was material part of consideration for payees' granting time extension to lienees, and hence, on rescission of time extension, note was due, justifying recovery (Civ.Code, §§ 1661, 1689).

2. Bills and notes ⇐137(1)

Junior lienor's agreement with payees to purchase secured note on original maturity date and payees' agreement with lienees granting time extension in consideration thereof *held* single executory agreement, which may be rescinded if consideration fails in material part (Civ.Code, §§ 1661, 1689).

3. Guaranty ⇐94

Payees successfully suing on guaranty of note *held* not entitled to attorneys' fees.

4. Appeal and error ⇐226(1)

Allowance of costs *held* not improper merely because cost bill was served prematurely, where no motion to strike cost bill was properly made in trial court.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Everett O. King and another against Nellie V. Carroll, formerly Nellie

V. Myers. Judgment for plaintiffs, and defendant appeals.

Affirmed.

John C. Miles and W. V. Anderson, both of Los Angeles, for appellant.

John A. Graham, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Appellant and her husband (now deceased), on August 15, 1930, executed a guaranty of a note secured by a deed of trust. The note matured in three years. Respondents herein are the payees of said note and the beneficiaries of said deed of trust. The note, deed of trust, and guaranty were all executed as a part of one transaction. At the time of the execution of said instruments, appellant and her husband (both of whom will be hereinafter referred to as appellant) held a junior incumbrance on the property described in the deed of trust. Subsequent to the execution of said instruments, the original makers of the note and trustors named in the deed of trust conveyed the property described in the deed of trust to A. W. Lane and Edith M. Lane, husband and wife, subject to the lien of respondents and the junior lien of appellant. Some time prior to August, 1932, the husband of appellant died, and she became the sole owner of the junior lien as a surviving joint tenant. In August, 1932, the Lanes were delinquent in the payment of interest on the note held by respondents, and wrote a letter to respondents acknowledging the delinquency and advising them that they intended to have a conference with appellant. Respondents upon receipt of said letter authorized the bank (trustee named in said deed of trust) to call the loan secured by the deed of trust, and thereafter had a conversation with appellant concerning the purchase by appellant of the trust deed and note owned by respondents. As a result of this conference between respondents and appellants, said parties called upon the Lanes, at the request of appellant, the Lanes being unknown to respondents, and, as a consequence of this latter conference and others which succeeded it, appellant agreed orally to extend the junior lien and respondents agreed orally to extend their senior encumbrance. On September 7, 1932, a written agreement was executed between respondents and the Lanes (hereinafter for convenience referred to as extension agreement), which extension agreement, in consideration of $1 paid by the Lanes and their promise to pay accrued and accruing interest on said note, provided in substance that respondents would extend the maturity date of the note and the trust deed securing same for a period of one year. This extension agreement between respondents and the Lanes was delivered to the Lanes on September 8, 1932, immediately after another written agreement had been executed between respondents and appellant. This latter written agreement (hereinafter referred to for convenience as purchase agreement) was executed by appellant on September 7, and delivered to respondents on September 8, and provided in substance that, if respondents would execute the extension agreement with the Lanes that appellant would on August 15, 1933, which was the original maturity date of the note held by the respondents, purchase from respondents for the full amount of the balance then unpaid thereon said note and the trust deed securing the same. Upon the execution of the extension agreement, there was paid by the Lanes to respondents $141, representing $140 interest in arrears and $1 consideration recited in the extension agreement. On May 7, 1933, interest on respondents' note again became delinquent, whereupon appellant went to the bank with respondents and paid said delinquent interest in the amount of $190. On May 26, 1933, appellant purchased the property covered by the deed of trust from the Lanes, and also received from the Lanes their assignment of all their rights and benefits in the extension agreement. On August 15, 1933, appellant did not perform in accordance with the purchase agreement, whereupon respondents on September 1, 1933, brought this action upon the original guaranty executed by appellant, having in the meantime, to wit, on August 24, 1933, rescinded said extension agreement "for the failure and/or partial failure of consideration."

The foregoing resumé of the evidence is but a comprehensive outline. It should be stated in addition that the testimony of the Lanes is uncontradicted that they had no knowledge of the purchase agreement, but there are facts other than those outlined which, when considered together with those which have been already specifically stated or suggested, indicate that appellant in the negotiations in question acted not only for herself but as agent for the Lanes, and had full authority to do so. There is, therefore, ample to justify and sustain the trial court's findings that: "3. That on or about the 8th

day of September, 1932, plaintiffs extended the note and trust deed, described in said complaint by the execution of a written instrument in words and figures as set forth in defendant's second separate and distinct defense in defendant's answer herein. 4. That the substantial and/or material consideration of and for the said Extension of plaintiffs, and the execution thereof, was the execution and delivery on or about September 8, 1932, by defendant to plaintiffs of her agreement in writing to purchase on August 15, 1933, from plaintiffs, the note and trust deed described in plaintiffs' complaint, for the balance remaining unpaid thereon. * * * 6. That defendant failed to purchase said note and trust deed from plaintiffs for the balance and/or sum and/or sums remaining unpaid thereon, in accordance with her agreement in writing. 7. That by reason of the failure of defendant to purchase said note and trust deed from plaintiffs on August 15, 1933, for the sum and/or sums then remaining unpaid thereon, as agreed by defendant in writing, and which was a substantial and material part of the consideration for said Extension of plaintiffs, said consideration from defendant to plaintiffs therefor partially failed, and said consideration failed in a substantial and material respect. 8. That by reason of such partial failure of consideration, plaintiffs were entitled to rescind their said Extension. 9. That plaintiffs, prior to the bringing of this suit, duly and according to law, and the provisions of section 1689 and section 1691 of the Civil Code of California, rescinded their said Extension. 10. That defendant is estopped to deny the right of plaintiffs to rescind the said extension of plaintiffs."

[1, 2] Appellant's point on appeal is that she stood in the shoes of the Lanes, and that she was not liable on the guaranty because the note was not yet due, since the extension agreement was a separate contract made by respondents with the Lanes for which there was a separate consideration paid by the Lanes, and that the purchase agreement was no part of the extension agreement. On the evidence and the facts, as found by the trial court, there can be no doubt that the purchase agreement was the inducing cause and a material part of the consideration for the extension agreement, and that appellant, acting for herself and as agent for the Lanes, was commissioned by the Lanes to obtain the extension agreement. The evidence and the logical inferences which may be drawn therefrom are sufficient to sustain the court's finding that the extension and purchase agreements were inseparable parts of one and the same transaction. On such findings the extension agreement might have been rescinded against the Lanes as readily as it was against the appellant. Both agreements together constituted but one executory agreement. Civ. Code, § 1661; Platt v. Butcher, 112 Cal. 634, 44 P. 1060; Henehan v. Hart, 127 Cal. 656, 60 P. 426. Such an executory agreement may be rescinded if the consideration for the same fails in a material part. Civ.Code, § 1689; Smith v. Blandin, 133 Cal. 441, 65 P. 894; Mulborn v. Montezuma Imp. Co., 69 Cal.App. 621, 232 P. 162; Richter v. Union Land & Stock Co., 129 Cal. 367, 62 P. 39.

[3] The court erroneously allowed attorneys' fees to respondents, but, as this item was stricken from the judgment, it is now a moot question.

[4] Respondents served their cost bill prematurely, and appellant contends that costs were improperly allowed for that reason. No motion to strike the cost bill was properly made in the trial court. This final contention of appellant is squarely answered by the case of Combs v. Eberhard, 120 Cal.App. 25, at page 31, 7 P.(2d) 338, 341, in which the court says: "Findings of fact and conclusions of law, judgment, and cost bills, were filed on the same day. The cost bills were served on September 6, 1931, some time before the findings and judgment were filed. Appellant makes no argument and cites no authority other than the Code section, but states that no costs should have been inserted in the judgment for the reason that no memorandum of costs was served in accordance with law. While it is true the cost bill was not apparently served in accordance with law, we think that this was but an irregularity, and that the judgment for costs is not void on its face. The appellant made no motion to strike the cost bills and we think she has therefore waived the objection."

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 5

PEOPLE v. SCHAFER.

Cr. 328.

District Court of Appeal, Fourth District, California.

Feb. 18, 1936.

1. Incest ⇐14

Evidence corroborating testimony of complaining witness *held* sufficient to support conviction of incest.

2. Incest ⇐16

Whether complaining witness in prosecution for incest was the daughter or stepdaughter of defendant *held* for jury.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

John Peter Schafer was convicted of incest, and he appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was charged with the crime of incest committed upon the person of his daughter, a girl of the age of 19 years, who was suffering from epilepsy. He was found guilty by a jury and has appealed from the judgment and from an order denying a motion for a new trial.

[1] The first contention is that the testimony of the complaining witness is not sufficiently corroborated. This witness told a clear and direct story that remained unshaken under cross-examination. This story was fully and completely corroborated by a statement made by the appellant shortly after his arrest and taken down by a shorthand reporter. The appellant took the stand and denied the essential elements of the charge. He admitted having told a different story to the officers, and the reason he gave for having done this was so unreasonable and preposterous as to justify the jury in refusing to believe anything he said. While on the stand the appellant told of certain other actions on his part, which need not be here repeated, which furnish further corroboration of the strongest nature. The complaining witness was corroborated to a degree rather unusual in cases of this nature.

[2] The only other point raised is that the evidence shows that the complaining witness is the stepdaughter of the appellant and not his daughter. The complaining witness testified that the appellant is her father. In the statement made to the officers shortly after his arrest, the appellant referred many times to the complaining witness as his daughter. While on the witness stand the appellant, for the first time, stated that the complaining witness is his stepdaughter. He testified, however, that he had never theretofore told any one that such was the case. He further testified that she had lived with him, that he had raised her since her birth, and that he was married to her mother at the time she was born. The question was one of fact and the evidence is sufficient to sustain the verdict of the jury.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.



11 Cal.App.2d 730

YOUNG v. HILLMAN et al.

Civ. 9537.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1936.

Hearing Denied by Supreme Court
April 16, 1936.

1. Usury ⇐111(3)

Court properly refused to permit amendment of complaint in action for difference between amount loaned to plaintiff by defendant and value of yacht, for which plaintiff had given defendant bill of sale to prevent foreclosure of mortgage given thereon as security for loan, 13 days after directing judgment for defendant and discharging jury, especially where defendant's counsel offered at time of hearing on original complaint to return boat to plaintiff on payment of principal without any interest.

2. Usury ⇐20

Borrower's execution of bill of sale to lender for boat covered by mortgage securing loan after default in payment thereof did

not constitute collection of usurious interest, though it might have resulted in profit to lender and mortgagee, in absence of allegation of duress or payment of any interest.

3. Usury ⇐138

Where no interest is paid on usurious note, only penalty is withdrawal of right to collect any interest called for in note.

HOUSER, P. J., dissenting in part.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by T. B. Young against Lloyd K. Hillman and another. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Harry K. Sargent, of Los Angeles, for appellant.

Rollinson, Phister & Bledsoe, of Los Angeles, for respondents.

YORK, Justice.

The complaint herein, which was held by the trial court to be insufficient to state a cause of action, alleged that on June 28, 1931, plaintiff, as owner of a twin-screw cruiser named "Rainbow," borrowed and received from defendant Lloyd K. Hillman the sum of $10,000; that "pursuant to said conspiracy" of the two defendants, plaintiff gave his promissory note in the sum of $13,857.70, with principal payable in installments together with interest at one per cent. per month on the unpaid balances, and also gave to defendant Hillman Auto Loan, Ltd., a chattel mortgage on the cruiser which was then valued at $25,000; that plaintiff being unable to pay the first installment which was due August 28, 1931, under date of September 15, 1931, gave a bill of sale of the cruiser to the defendant Lloyd K. Hillman; and that, as a result thereof, the defendants unlawfully, fraudulently, maliciously, and oppressively, "pursuant to the said conspiracy," took and received from the plaintiff for said loan of $10,000 grossly exorbitant usurious interest and profit of the value of $15,000. The prayer is for judgment of $15,000 as actual usurious damages and $50,000 as exemplary damages. Plaintiff seeks by this action to recover the difference between the alleged principal loaned and the alleged value of the yacht as usurious interest, on the theory that the transfer by a bill of sale of the cruiser, upon which a chattel mortgage had been given as security for the original loan, constituted payment of usurious interest.

The cause came on for trial on September 22, 1933, a jury was duly impaneled, and counsel for plaintiff made his opening statement, whereupon defendants objected to introduction of any evidence in support of plaintiff's alleged cause of action, on the ground that the complaint failed to state facts sufficient to constitute a cause of action, which objection was sustained by the trial court. Thereafter, on October 5, 1933, plaintiff made a motion to set aside the minute order made by the court on September 22, 1933, directing that judgment be entered in favor of defendants, and also that plaintiff be given permission to file an amended complaint; whereupon, on October 17, 1933, the court denied plaintiff's motion to set aside the minute order that judgment of dismissal be entered, and plaintiff's motion for leave to file an amended complaint was denied. On October 25, 1933, the court made and entered its judgment dismissing the action on the ground that the complaint did not state facts sufficient to constitute a cause of action, and ordered that the defendants have and recover their costs from the plaintiff.

The record before us discloses that on September 22, 1933, the court made a thorough examination of the facts involved in the transaction, asking each of the attorneys just what he expected to prove. From the facts thus disclosed, the trial judge was justified in his apparent conclusion that the transaction here involved was nothing more or less than one wherein a debtor, who was obligated under a secured debt, turned over property given as security therefor, rather than to stand a foreclosure action. Apparently there was no compulsion used other than a threat to foreclose the chattel mortgage. At the time of such hearing, no attempt was made by plaintiff or his attorney to file any amendment to the complaint; in fact, it was stated that they intended to appeal from the judgment, and requested the court to make a memorandum of his decision. The court replied: "I will be glad to do so, to summarize in writing what I have said here." Mr. Sargent, attorney for appellant, answered: "Well, I mean just for the purpose of appeal, just to show the ruling of the court on the motion made. The Court: I will be very glad to comply with that request. The jury will be ordered discharged and a judgment for costs entered for the defendant." Whereupon, the jury

was brought into the courtroom and was discharged by the court, and the court adjourned, without any motion having been made by plaintiff, but thereafter and after such adjournment on said 22d day of September, 1933, the plaintiff made an ex parte oral application to the trial judge in chambers for leave to file an amended complaint, which request was denied; the judge advising counsel for plaintiff that the only way to bring such a matter properly before the court would be on motion in open court after due and written notice to the defendants. Thereafter, on the 5th of October, 1933, plaintiff moved the court for an order setting aside the minute order of September 22, 1933, directing judgment for defendants, and at the same time applied to the court for permission to file an amended complaint, which application was supported by affidavit of plaintiff's attorney and resisted by an affidavit of one of the attorneys for the defendants, which latter affidavit recites (which recitation is not denied) as follows: "* * * that plaintiff's counsel did not at any time indicate that he wished to amend his complaint herein prior to the hearing of said objection (to the introduction of evidence) nor at any time during the hearing of said objection, nor until after he had left the courtroom upon the ruling of the court upon said objection, and had returned to his office; that at the present time, plaintiff's counsel still insists, and has so stated to affiant, that said original complaint filed in said action states a cause of action against the defendants; that affiant makes this affidavit in opposition to plaintiff's affidavit filed in support of his motion to file an amended complaint herein, and for the purpose of showing that the ruling of the above-entitled court in excluding any evidence from being introduced in the support of the allegations contained in the plaintiff's complaint did not surprise counsel, and that the failure of plaintiff's counsel to file an amended complaint herein was not occasioned by any mistake, inadvertence or excusable neglect upon his part, as mentioned in section 473, C.C.P."

It is recited in the judgment of the court entered under date of October 25, 1933: "The court having heard said motions and the arguments of counsel, and having duly considered said proposed amended complaint *upon the merits*, and having come to the conclusion, *for reasons set forth* in the Court's Notice of Decision which has been filed herein, that neither said proposed amended complaint nor the original complaint states facts sufficient to constitute a cause of action, the court denied plaintiff's motion to set aside the aforesaid minute order and also the motion for leave to file the proposed amended complaint. Plaintiff's counsel having requested the court so to do, the court now indicates that its sole reason for denying the said motions was the *aforesaid conclusion* reached by the court with respect to the insufficiency of the complaint and the proposed amended complaint." (Italics ours.)

[1] The court's reference to the failure to state a cause of action is apparently limited by its finding that it had considered the question of setting aside the order for judgment and the motion for leave to file the proposed amended complaint on *its merits*. By this the court undoubtedly referred to the discussion which took place between the said court and counsel for plaintiff as to the facts involved in the transaction complained of at the time of the hearing in open court on September 22, 1933. That is probably the reason why both the court and counsel for plaintiff desired to have the discussion that took place at this so-called hearing set forth in full in the record. The amendment which was proposed at a later date was considered by the trial judge, but in his statements regarding his reason for his ruling, he stated nothing more than the facts disclosed to him upon the hearing. It would be a peculiar thing, if, after the lapse of time shown, and some time after the jury had been discharged, the court would permit an amendment, especially in view of the fact that at the time of the hearing when the original complaint was ruled upon, counsel for defendants offered to return the boat plus over $4,000 in improvements to the plaintiff, if he would pay merely the *principal* of the loan *without any interest*, which offer was peremptorily refused by counsel for the plaintiff.

[2, 3] In the case before us it was not alleged that any cash payment was ever made—in fact, an actual default had been made and after such default the plaintiff delivered the cruiser to respondents and executed a bill of sale to defendants at the same time. It is not alleged that under his contract with defendants he was under any obligation so to do and so far as the complaint alleges, he could have resisted successfully any effort of respondents to take possession of the cruiser. Furthermore, the complaint fails to state any of the details or terms of the transaction by which the cruiser was turn-

ed over to respondents. Appellant based his cause of action upon something that occurred after he had made default in payment. As far as the complaint shows, the original loan, in so far as the original $10,000 was concerned, was a perfectly valid transaction, and so was the giving of the chattel mortgage on the cruiser as security for payment of that part of the note that was given for the $10,000 actually loaned; and when appellant defaulted in his payment as provided by the original note, respondents had, of course, the right to foreclose on the chattel mortgage at least to the extent of $10,000 of the note secured thereby. The giving of the bill of sale for the cruiser, as alleged, even though it might have resulted in a profit to respondents, could not constitute the collection of usurious interest, unless respondents were alleged to have forced the giving of said bill of sale in some way. No *payment* of any interest is alleged. If *no interest is paid* on a usurious note, the only penalty to be exacted is the withdrawal of any right to collection of any interest called for in the note.

We can find nothing in the complaint which indicates that the cruiser was delivered to respondents by appellant in payment of usurious interest.

The judgment is affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.



11 Cal.App.2d 463

BRITTING v. DEWES et al.

Civ. 9770.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1936.

Rehearing Denied Feb. 27, 1936.

Hearing Denied by Supreme Court March 26, 1936.

1. Damages ⇐96

Damages recoverable in personal injury case are within jury's sound discretion.

2. New trial ⇐77(2)

To safeguard against excessive verdicts, trial court, in ruling on motion for new trial, may consider evidence anew and set aside verdict if in court's opinion excessive damages have been awarded under influence of passion or prejudice.

3. Appeal and error ⇐1004(1)

On appeal, reviewing court may not reduce damages in personal injury case unless as matter of law award is so grossly disproportionate to compensation reasonably warranted as to shock sense of justice and raise presumption that award was result of passion, prejudice, or corruption.

4. Damages ⇐130(3)

$3,000 to secretary earning $40 per week with expenses *held* not excessive for injury to nerves, muscles, and ligaments of upper and lower areas of spine, and bruises to arms, legs, and shoulder, which deprived secretary of her earning power for 32 weeks and necessitated medical treatment.

5. Appeal and error ⇐930(1)

On appeal on ground of excessive verdict in personal injury action, every conflict must be resolved in favor of plaintiff, including benefit of every inference which reasonably can be drawn in support of claim.

6. Damages ⇐216(4)

Instructing that, in estimating damages, physical and mental pain, if any, could be considered, *held* not erroneous on ground that there was no evidence of mental pain, since instruction left question whether plaintiff suffered mental pain to jury as issue of fact.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Christine Martin Britting against Peter Dewes and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal. Thomson, of San Francisco, of counsel), for appellant.

Phillip Barnett and Jacobs, Blanckenburg & May, all of San Francisco (Samuel Vartan, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

Plaintiff was injured while alighting from an automobile standing at the bottom of a hill on Sacramento street in San Francisco when another automobile belonging to the defendant Peter Dewes, which had been parked at the top of the

hill, rolled driverless and unattended down the hill, and at a rate of speed estimated between 30 and 40 miles an hour, and crashed into the automobile from which plaintiff was alighting; and on account of the personal injuries sustained she brought this action for damages. At the trial, which took place before the court sitting with a jury, negligence on the part of the defendant was admitted, and consequently the question of the amount of damages, if any, plaintiff was entitled to receive, was the sole issue the jury was called upon to determine. The total amount of damages sued for, general and special, was $7,430, and the jury awarded $3,000, which defendant contended was grossly excessive, and he moved for a new trial mainly on that ground. The motion was denied, and defendant has taken this appeal from the judgment, contending here, as he did before the trial court, that the amount of damages awarded by the jury is grossly excessive.

With respect to the matter of the alleged special damages, it appears that for nearly eight years preceding the accident plaintiff had been employed as secretary and general assistant to the manager of a company engaged in the shipment and distribution of fruits and vegetables throughout the United States; that her duties consisted of secretarial office work and traveling about to different distant places to attend to the proper distribution of the shipments; that she received therefor weekly wages of $40 and an additional weekly payment of $25 for living expenses; and plaintiff testified that on account of the injuries she received she was unable to continue on with said employment, and as a consequence was deprived for a period of thirty-two weeks of her earnings of $40 a week, and the additional weekly sum of $25 paid to her as living expenses; that during such period of time she had been able to earn only $150 from other sources.

In considering the question of whether the jury's award is excessive, it is, of course, impossible to ascertain what portion of the total award of $3,000, if any, the jury allocated to cover the alleged special damages sustained. It would seem, however, that if, as plaintiff testified and the jury impliedly found, plaintiff's injuries were of such serious nature as to prevent her for the period of time mentioned from continuing the duties of the employment she had followed preceding the accident, the trial judge was justified in holding on motion for new trial that the amount of damages awarded by the jury was not grossly excessive.

In this connection the evidence shows that the force of the impact of the two automobiles threw plaintiff violently against the steering wheel and to the floor of the automobile from which she was about to alight. She suffered no fractured or dislocated bones, and about half an hour after the accident was driven by appellant's father to the home of a Mr. and Mrs. Roberts, with whom she was riding at the time of the accident, and she was able to walk unassisted from the automobile into the house. After remaining there for a few hours, she proceeded to her own residence and went to bed immediately. On the second day after the accident she consulted a doctor, and she was still under treatment by him at the time of the trial, which took place about a year after the accident happened. In describing her condition, the doctor testified that he found her suffering from bruises and strains, a twisting of the spine from the base of the skull to the lower back, with deep injuries to the neck and upper and lower areas of the spine; that the injuries to the upper area involved the nerves, muscles, and ligaments; that there was tenderness of those areas, and the injuries were severe enough to tear some of the tissues and produce swelling. He further testified that the top of her head was slightly numb to pressure and sensitive to cold; that her neck was stiff, with the muscles tightened; that on the left side of the neck there was a large black and blue bruise which was swollen and caused much pain upon rotation of the neck; that there were deep bruises in the deltoid area, extending to the elbow, tenderness on the spine from the skull to the angle of the scapula, with black and blue area, also pain upon pressure over the base of the skull; that there was limitation of movement of the spine and complaints of pain when lying on her back, and an inability to sleep; furthermore, that there were multiple bruises to the arms and legs, with quite large black and blue areas on the legs; that the veins of her legs were bruised rather deeply, causing little knots to form which later developed into an infection called phlebitis; and that there were deep bruises on the left shoulder which he considered were caused

either by pulling, twisting, or some driving force. As to the medical treatment administered, the doctor testified that she was kept in bed for a while and that her legs were treated for a long period of time for phlebitis; that it was necessary to wrap them with cotton dressings and elastic bandages, and to massage and "bake" her arms, legs, and back; that she was also given medication for the headaches about which she complained, opiates to relieve pain and bring about sleep, and general treatment to build her up physically. He also testified that up to the time of trial the treatments required 73 office visits by plaintiff; that most of the injuries to her collarbone, shoulder, and spine persisted over a period of a year, indicating a tearing and bruising of those areas which were probably of a more or less permanent nature; and that her injuries incapacitated her from full-time work and caused a rather heavy expense for treatment. About a year after the accident plaintiff was examined by another doctor, who testified that at that time he found tenderness over the forepart of the scalp; that bending her neck forward caused some pain at the base of the neck; that rotation of the neck or bending it to the right or left caused pain in the muscles of the shoulder blades; that on pressure there was some tenderness over the spine in the lower thoracic and upper lumbar regions; and that shoulder movements showed a very marked crepitus or cracking, which caused considerable pain.

[1-4] The authority to fix the amount of damages that shall be allowed in a case of this kind is committed almost entirely to the sound discretion of the jury; and, in order to safeguard against the danger of excessive verdicts, the judge of the trial court in ruling on motion for a new trial may consider the evidence anew and set aside the verdict of the jury, if in his opinion excessive damages have been awarded under the influence of passion or prejudice. On appeal, however, the reviewing court may not exercise the power of revision unless it is able to hold, as matter of law, that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest, sober judgment. Reneau v. Hirsch, 88 Cal.App. 1, 262 P. 1100; Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.(N.S.) 687, Ann.Cas.1912C, 50; Horn v. Yellow Cab Co., 88 Cal.App. 678, 263 P. 1025; Gregoriev v. Northwestern Pac. R. Co., 95 Cal.App. 428, 273 P. 76; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76. And in the present case it is evident, in view of the testimony above narrated, that we would not be warranted in so holding.

[5] Appellant points out certain portions of the cross-examination of plaintiff and calls attention to the testimony given by two medical experts and other witnesses produced by him, contending in this regard that circumstances were shown thereby which proved that plaintiff was not seriously injured, nor disabled to the extent of preventing her from performing the duties of the employment in which she was engaged at the time of the accident or other like duties. It is evident, however, that the circumstances relied on by appellant at most raised but a conflict in the evidence; and it is well settled that, in dealing with questions of this kind on appeal, every conflict must be resolved in favor of the plaintiff and she must be given the benefit of every inference that can be reasonably drawn in support of her claim. Kimic v. San Jose-Los Gatos, etc., R. Co., 156 Cal. 273, 104 P. 312; Sarcady v. Biedenweg, 116 Cal.App. 581, 3 P.(2d) 43; Sites v. Howrey, 108 Cal.App. 348, 291 P. 597; Johnson v. Pearson, 100 Cal.App. 503, 280 P. 394; May v. Farrell, 94 Cal.App. 703, 271 P. 789.

[6] The trial court gave the usual instruction as to the measure of damages, wherein it stated, among other things, that in estimating the amount of damages the jury might "consider the physical and *mental* pain, *if any,* suffered * * *" (italics ours); and defendant contends that there was no element of mental pain involved in the case and that therefore the instruction was erroneous. There is no merit in the point. The symptoms attending plaintiff's injuries, as shown by the evidence, justified the court in giving the instruction, and, by reason of the inclusion therein of the words "if any," the question of whether or not plaintiff did suffer mental pain was left entirely to the determination of the jury as an issue of fact. So far as we know, it may have reached a negative conclusion thereon, and conse-

quently allowed no damages whatever therefor.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



12 Cal.App.2d 30

In re FAIRFIELD'S ESTATE.

HILL v. BLACKMARR et al.

Civ. 10085.

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1936.

Wills ⇐806

Will devising life interest in realty to person not related to testator with remainder to first cousin of testator and reciting that testator "especially wished" life tenant to have property he had given her *held* to show preference in favor of life tenant, so that, in abatement of legacies, remainderman's interest was properly sold before that of life tenant, "especial" meaning not general or special (Probate Code, § 752).

[Ed Note.—For other definitions of "Especial," see Words & Phrases.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding in the matter of the estate of Frederick P. Fairfield, deceased, wherein W. A. Blackmarr was appointed executor. From an order confirming the sale of real property subject to a life estate devised to Ellen M. Perry by the will of Frederick P. Fairfield, deceased, Ellen M. Perry appeals.

Affirmed.

John P. Beale, of San Francisco, and Louis Oneal and Duncan Oneal, both of San Jose, for appellant.

L. F. Hobbs, of San Jose, for respondent Blackmarr.

Frank L. Crist, of Palo Alto, for respondent Perry.

SPENCE, Justice.

This is an appeal by Geneva Hill from an order confirming the sale of certain real property subject to a life estate devised to Ellen M. Perry by the will of the testator.

The only point raised by appellant is that the court erred in confirming the sale of the remainder interest which had been devised by the will of the testator to appellant, Geneva Hill, a first cousin of the testator, "when other real and personal property which had been specifically bequeathed and devised to persons not related to the testator was available for sale and no effort had been made to sell the same."

The testator died in 1933, leaving an estate consisting of a piece of real property valued at $3,500 and personal property valued at about $2,800. The cash consisted of $112.60. Shortly before his death, the testator executed a will in which he specifically bequeathed and devised to various named persons practically all of his property, real and personal. The main beneficiaries were two friends, W. A. Blackmarr and Ellen M. Perry. Practically all of the personal property was left to them, and a life estate in the real property was left to Ellen M. Perry, who was then 49 years of age. The remainder interest in said real property was left to appellant, Geneva Hill, and the residuary clause was made in her favor. After thus disposing of his entire estate, the testator included in his will a further paragraph numbered "eleventh." In this paragraph, he expressed his reason for leaving nothing to relatives not mentioned in the will. He further stated, "I have made the above bequests to my friends W. A. Blackmarr and Mrs. Ellen M. Perry, both of whom have been exceedingly kind to me during my old age, and I appreciate that kindness and especially wish them to have the property I have given them."

It is the contention of appellant that "section 752 of the Probate Code of the State of California settles the question here involved." Said section reads as follows: "Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." It is conceded that this section has not been construed since its enactment as part of the Probate Code, and that the only case construing the sections of the Civil Code which preceded it is the Estate of Apple, 66 Cal. 432, 6 P. 7. A reading of that case clearly shows that what was said concerning the sections of the Civil Code was unnecessary to the decision. But assuming that said section 752 of the Probate Code is applicable and that the

point was properly raised at the time of the confirmation of the sale, we nevertheless believe that the provisions of said section sustain the position of respondents rather than the position of appellant.

Omitting the portion of the section which admittedly has no application here, the section reads: *"Unless a different intention is expressed in the will* * * * legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." (Italics ours.) The question then arises as to whether the testator in the present case expressed a different intention in his will. We are of the opinion that he did. He disposed of his entire estate and then stated, "I * * * especially wish them (W. A. Blackmarr and Ellen M. Perry) to have the property I have given them." In Webster's New International Dictionary (2d Ed.) the adjective "especial" is defined as "not general; special. Distinguished among others of the same class as exceptional in degree." We are satisfied that the testator's intention, as expressed in his will, was to distinguish between the legacies to W. A. Blackmarr and Ellen M. Perry and the legacies to others, and to show a preference in favor of the former. We therefore conclude that appellant's contention may not be sustained.

The order confirming the sale is affirmed.

We concur: NOURSE, P. J; STURTEVANT, J.

12 Cal.App.2d 57

In re WHITE'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. WHITE.

Civ. 1948.

District Court of Appeal, Fourth District, California.

Feb. 20, 1936.

Executors and administrators ⊂=375

Confirmation of executor's sale of realty at one-twentieth of its net value after deducting unpaid irrigation district assessments and delinquent taxes *held* abuse of discretion, notwithstanding that realty had been sold for taxes and that estate had no funds wherewith to redeem property from tax liens, where executor made no effort to clear title to property as against tax purchaser.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Proceeding in the matter of the estate of Thaddeus White, deceased. The Bank of America National Trust & Savings Association, as guardian of the estate of Alfred White, a minor, and as guardian of the estate of Ester White, a minor, filed objections to the petition of Fletcher White, as executor of the estate of Thaddeus White, deceased, for confirmation of sale of certain real property of the estate. From an order confirming the sale, the guardian appeals.

Order reversed.

Edward E. Craig, of Berkeley, for appellant.

M. C. Atchison, of Calexico, for respondent.

JENNINGS, Justice.

This appeal from an order of the superior court sitting in probate confirming the sale of certain real property of the estate of Thaddeus White is presented through the medium of a bill of exceptions. From the transcript on appeal it appears that Thaddeus White made his will on July 22, 1922, in which it was recited that the testator owned 87 acres of land in Imperial county which he directed should be sold after his death, and that from the proceeds derived from such sale the executor named in the will should pay two designated grandchildren of the testator legacies amounitng to $1,000 each. On January 27, 1927, Thaddeus White entered into a contract with Pioneer Transfer Company, a corporation, whereby he agreed to sell the land mentioned in the will to the corporation for a certain sum of money. The contract provided that the sale price, whose amount does not appear, should be paid in installments. From payments made under the terms of the contract White received approximately $3,600. In the year 1930 the purchaser was in default in the payments due under the contract. The contract was thereupon canceled by mutual consent, and on February 1, 1930, a new contract was executed by the same parties whereby the corporation agreed to pay the amount specified therein in monthly in-

stallments over a period of time ending in July, 1938. The corporation again defaulted in payment of the amounts due under the second contract. On June 17, 1931, Thaddeus White died. Respondent, Fletcher White, who is a son of the deceased, was appointed executor of the will. At the time of White's death, the purchaser of the property had failed to make the monthly payments for an unspecified period of time, and was in default in an amount which is not stated. The purchaser had also failed to pay various taxes and assessments levied against the property. The executor filed an action against the purchaser whereby he sought to recover the amount of the payments which were in default. The corporation had by this time sold and disposed of all other property which it owned in California and had moved its business into the Republic of Mexico, where it continued its operations at some place in or near the city of Mexico. The suit thus prosecuted by the executor was productive of no tangible result. In the meantime the Imperial Irrigation District levied on the land for unpaid assessments, and it was sold to the district for the amount of such assessments. The assessor of said district executed and delivered his deed conveying title to said land to the district on October 18, 1932, which deed was duly recorded. Taxes due the state of California had also become delinquent, and the land was sold to the state for such delinquent taxes, which amounted to approximately $689.91, exclusive of taxes due for the year 1934–1935. On September 21, 1934, the state inheritance tax appraiser for Imperial county appraised the land as having a total gross value of $6,150, taking no account of unpaid assessments and taxes or of the status of the title to the property. On October 10, 1934, the date on which the respondent executor filed his petition for confirmation of sale of the property, the unpaid assessments due the Imperial irrigation district amounted to $3,300. The estate was without funds sufficient to redeem the property from the liens of the delinquent taxes and assessments. The property was accordingly sold by the executor to his brother Roy White, also a son and heir of the deceased, for the sum of $100. The Bank of America National Trust & Savings Association was appointed guardian of the minor grandchildren of the deceased, legatees under his will, on December 8, 1931. Said bank was duly notified of the filing of the executor's petition for confirmation of the sale of the property, and filed written objections to confirmation of the sale, alleging that the price for which the executor proposed to sell the property is grossly inadequate, and that the total value of the estate of which the above-mentioned property is the greater portion is at least $16,000. On the date appointed for the hearing of the petition for confirmation of the sale, evidence consisting of the testimony of the executor was presented to the trial court. The court overruled the objections of the aforementioned guardian and made its order confirming the sale of the property.

On this appeal two reasons are urged for reversal of confirmation. These are, first, that the sale of the property to a brother of the executor is in violation of the relationship of trust and confidence which exists between the executor and the legatees named in the will, and, second, that the sum of $100 bid for the property is grossly inadequate, notwithstanding the evidence submitted to the court on the hearing of the petition for confirmation established that the land had been sold by the testator to a corporation which had defaulted in payments that were due under the contract of sale and that sums whose total amounted to $3,989.91 for delinquent assessments and taxes assessed against the property were due and payable at the time the order of confirmation was made.

It is our opinion that the second of the above-stated contentions must be sustained. The only evidence submitted to the court on the hearing of the petition for confirmation and appellant's objections thereto consisted, so far as appears from the record, of the testimony of the executor of the will of Thaddeus White, deceased. In addition to the facts hereinabove set forth, this witness testified that the estate of the deceased is bankrupt; that he was never let into possession of the property whose sale to his brother is sought to be confirmed; that the estate has no funds with which to redeem the property from the liens for delinquent taxes and assessments; that on September 21, 1934, the gross value of the property was appraised at the sum of $6,150 without taking account of the amounts due for delinquent taxes and assessments or of the condition of title to the property; that the property or the right, claim, or equity of the estate in the property was sold at public auction on October 9, 1934, to Roy White

for the sum of $100; that he believed the sale was for the best interest and benefit of the estate and was necessary to accomplish final settlement and closing of the estate. On cross-examination the witness admitted that confirmation of the sale would result in the payment of no part of the legacies left by the will to appellant's minor wards.

From the last-mentioned facts, in addition to those hereinabove stated, the following situation is therefore disclosed: Property which on September 21, 1934, had a value of $6,150 was subject to the liens of unpaid irrigation district assessments and delinquent state and county taxes in a total amount of approximately $4,100, and had been sold for such taxes and assessments and deeds executed to the purchasers at such sales. Prior to the testator's death, he had entered into a contract to sell the property; the purchaser agreeing to pay the purchase price in monthly installments extending over a period of eight years. The contract thus executed contained no acceleration provision. Prior to the testator's death the purchaser had defaulted in payment of a number of the monthly installments. Taxes and assessments which presumably were to have been paid by the purchaser were not paid and had become delinquent, resulting in the above-mentioned sales of the property. The purchaser abandoned the property, made no payments on the purchase price, left the state of California, and went to a foreign country. The executor instituted an action to recover from the purchaser the amount of unpaid installments due under the contract. No recovery was had against the purchaser in this action by reason of the fact that it had removed all of its property and assets other than the land which it had agreed to purchase from the testator outside the jurisdiction of the court wherein the suit was pending. The estate is insolvent and has no funds wherewith to redeem the property from the liens of delinquent taxes and assessments. The executor proceeds to sell whatever right or interest the estate has in the property at public auction for the sum of $100 and the sale is confirmed.

The situation thus disclosed is apparently hopeless. The estate does not have title to the property and has no funds wherewith to redeem it from the tax liens. Nevertheless, it does not appear that any effort has been made by the executor to clear the title to the property as against the purchaser. It must be conceded that clearing the title as against the purchaser will not relieve an apparently insolvent estate from the payment of delinquent taxes and assessments. However, it would be a step in the direction of clearing the tangled condition of the title and would furnish tangible evidence of the executor's good faith in dealing with minor beneficiaries under the will. It may well be that, as respondent suggests, the result of setting aside the approval of the sale will be to confirm ownership of the property in the irrigation district. If this situation should develop, the minor legatees will nevertheless be in no worse situation than they now are. If the order of confirmation is approved, it is not open to doubt or dispute that neither of them will receive payment of any part of the legacy specified in the will.

Since it appears that the sale of the property was accomplished for a sum which is not greater than one-twentieth of its net value after deducting the full amount of unpaid irrigation district assessments and delinquent taxes, we are forced to the conclusion that the confirmation of the sale was an abuse of discretion on the part of the trial court. In re Estate of Bazzuro, 161 Cal. 71, 76, 118 P. 434. Arrival at this conclusion renders it unnecessary to give consideration to appellant's contention that the sale of the property to a brother of the executor is in violation of the trust relationship which exists between the executor and appellant's minor wards who are beneficiaries of the testator under his will. It is likewise unnecessary to give consideration to appellant's application for the taking of further testimony by this court for the purpose of establishing matters which it is claimed appeared in evidence at the time the petition for confirmation was heard and which are not included in the bill of exceptions settled by the court, due to the fact that no court reporter was present at the hearing. Appellant's application for the taking of further testimony is therefore denied.

For the reasons stated, the order of confirmation is reversed.

We concur: BARNARD, P. J.; MARKS, J.

JACKSON v. CITY OF SANTA MONICA.*

Civ. 10037.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1936.

1. Statutes ⇐141(2)

Constitutional provision against law being amended by reference to title which requires the act or section amended to be re-enacted and published at length *held* to relate only to direct amendments and not to amendments effected through implication (Const. art. 4, § 24).

2. Statutes ⇐141(2)

Amendment to statute requiring claims against "public officials" to be filed within 90 days, which amended defining section of statute, so that term "public officials" included "employees," and thereby indirectly amended section requiring claims to be filed, *held* valid, notwithstanding section indirectly amended was not re-enacted in amending act (St. 1931, pp. 2477, 2478, §§ 1, 4; St.1933, p. 2147, § 4; Const. art. 4, § 24).

3. Statutes ⇐141(1)

Word "section" as used in constitutional provision requiring act being revised or section amended to be re-enacted and published at length means a section of an act (Const. art. 4, § 24).

[Ed. Note.—For other definitions of "Section," see Words & Phrases.]

4. Statutes ⇐148

Addition of new sections to Code which change operation of existing sections of same Code does not necessitate re-enactment of such other sections (Const. art. 4, § 24).

5. Automobiles ⇐230

Failure of plaintiff to file claim within 90 days against city for damages for injuries sustained when plaintiff was struck by city's motorbus driven by city employee *held* to bar action against city (St.1931, pp. 2477, 2478, §§ 1, 4; St.1933, p. 2147, § 4).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Charles J. Jackson against the City of Santa Monica. From an adverse judgment, the plaintiff appeals.

Affirmed.

Paul Blackwood and Bingham Gray, both of Los Angeles, for appellant.

Shattuck, Davis & Story and George H. Moore, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff sued the city of Santa Monica for damages for personal injuries sustained when he was struck by a motorbus owned and operated by the defendant city and driven by a city employee, one Earl H. Dawes.

As one of the defenses made by its answer, the city alleged that plaintiff did not file with the city or with the employee Dawes any claim or demand on account of his damages for more than 3 months after the date of the accident, October 5, 1933. The sufficiency of this defense was tested at the time of trial upon plaintiff's demurrer to the same, and, the demurrer having been overruled, the facts alleged in the special defense were admitted by plaintiff to be true, and judgment was entered in defendant's favor without further trial.

In support of this defense, the city relies upon chapter 1168, Statutes of 1931, page 2476, as amended by chapter 807, Statutes of 1933, page 2147. Section 1 of the act of 1931 reads in part as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, and/or the negligence or carelessness of any public officer, a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred."

Section 4 of that act before its amendment read as follows: "Wherever the word 'person' or 'public' are used in this act, such words shall be deemed to include any pupil attending the public schools of any school or high school district."

By the act of 1933, section 2 of the act of 1931 was amended in certain particulars not necessary to consider; section 4 of the act was repealed and a new section 4 added, reading as follows:

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Decision vacated on court's own motion Feb. 27, 1936.

*For subsequent opinion see 57 P.2d 226.

"The word 'person' includes any pupil attending the public schools of any school or high school district.

"The words 'public property' include any vehicle, implement or machinery owned by a municipality, county, city and county, school district, or the State of California, or operated by or under the direction or authority or at the request of any public officer.

"The words 'public officer,' 'officer' or 'officers' include any deputy, assistant, agent or employee of a municipality, county, city and county, school district or the State of California, acting within the scope of his office, agency or employment."

The amendatory act had the following title: "An act to amend sections 2 and 4 of an act entitled 'An act relating to the liability and damages of officers of municipalities, counties, cities and counties, school districts, and the State of California, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property, and alleged to be due to the negligence or carelessness of such officers; prescribing the duties of claimants in such cases, and authorizing the State and such public or quasi-public corporations to take out and pay for insurance to protect their officers against such liability,' approved June 19, 1931, extending the provisions of the act to include suits against employees as well as officers of municipalities, counties, cities and counties, school districts, and the State and to suits against such officers and employees for alleged negligence or carelessness thereof while engaged in the public service, and defining terms used in the act." St.1933, p. 2147.

The trial court held that plaintiff's claim did not constitute a legal demand against the city, for the reason that he had not complied with the provisions of the act of 1931, as thus amended, in that his claim for damages, sustained through the alleged negligence of an employee of the city, had not been presented to the city or to the employee Dawes within 90 days after the accident. Appellant contends that the 1933 amendment of the act was void and of no effect because of the alleged failure of the Legislature, in enacting the same, to comply with the provisions of article 4, section 24, of the Constitution, which provides that: "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be reenacted and published at length as * * * amended," etc. Section 1, so far as here involved, originally related only to negligence or carelessness of a "public officer," whereas section 4 of the 1933 act defines the word "officer" to include "deputies," "assistants," "agents," and "employees" of a municipality, thus requiring the filing of a claim for damages sustained through the negligence of an employee as well as in a case of negligence of an officer.

[1, 2] Appellant's argument is that the definition of the word "officer" would result in a change in the meaning of section 1 of the 1931 act, and would effect the same result as though the words "deputy," "assistant," "agent," and "employee" had been inserted in said section 1. It is said that, if these words had been inserted in the section by amendment, it would have been necessary to re-enact and publish said section 1 as so amended, and that therefore the method pursued by the Legislature of defining the word "officer" instead of rewriting and re-enacting section 1 to add the additional words was an unconstitutional and invalid one. The argument is in effect that the scope of section 1 of the act could not be enlarged except by rewriting, re-enacting, and publishing the section so as to include the amendatory provisions. The point we are called upon to decide is this: If the effect of amending one statute or one section of a statute is to indirectly bring about a change in the operation of another statute or other sections of the same statute, is the amendment one which must be adopted by the procedure prescribed by the Constitution and which would have to be followed if the changes in the existing laws were accomplished by direct amendment of such laws? The answer to the question is found in the reasoning underlying the rule, consistently followed by our courts, that the constitutional provision relates to direct amendments and not to amendments effected through indirection or implication. The purpose of section 24 of article 4 was stated by the Supreme Court in Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 920, 45 P. 1057, in quoting Judge Cooley in People v. Mahaney, 13 Mich. 481, as follows: "The mischief designed to be remedied was the enactment of statutes in terms so blind that legislators themselves were sometimes

deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was perhaps sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation." The purpose was not, however, to require that every act passed by the Legislature should be regarded as amendatory of existing statutes merely because it affected the operation of such statutes. As stated by Justice Temple in the case just referred to: "To say that every statute which thus affects the operation of another is therefore an amendment of it, would introduce into the law an element of uncertainty which no one can estimate. It is impossible for the wisest legislator to know in advance how every statute proposed would affect the operation of existing laws." It was held in that case that, if the Street Bond Act of 1891 (St.1891, p. 116) amended by implication the Vrooman Act of 1885, as in fact it purported to do as stated in its title, "* * * by adding thereto an additional part numbered four, consisting of sections 38 [etc.], relative to a system of street improvement bonds," yet it was not such an amendment as required re-enactment or publication of the Vrooman Act. It was said: "But an act is not revised, nor a section amended, within the purview of the above inhibition, by an act which adds new sections which leave in full operation all the language of the statute which it purports to amend." In Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73, the same rule was applied to an amendment by implication. In Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754, 763, the court considered an amendment passed in 1923 (St.1923, p. 633) to the City Boundary Line Act of 1911 (St. 1911, p. 1018), in which it was provided, that, for work done under the latter act, bonds might be issued under the provisions of an act of the Legislature of 1893 (St.1893, p. 175), which provided for the issuance of bonds to represent assessments for the cost of street work. It was contended that the new legislation amounted to a revision or amendment of the earlier. This was held not to be the case. The court said: "Every one of the provisions of the bond act of 1893, in force when the City Boundary Line Act became a law, remained in full force for the accomplishment of every purpose for which it was originally designed. The later act, by virtue of its own terms, merely extends the provisions of the earlier act to the issuance of bonds to represent assessments levied under the later act. By so doing, the later act simply incorporates into itself those provisions of the earlier act which are suitable to its purposes."

In Re Coburn, 165 Cal. 202, 131 P. 352, 356, it was contended that section 1767 of the Code of Civil Procedure was invalid because it defined the word "incompetent," and, as the word was used in other sections, namely, 1763 and 1764 of the same Code, and such other sections were not reenacted so as to include the definition given by section 1767, that the constitutional requirement had not been observed. In disposing of this contention the court said: "In enacting section 1767, the Legislature was not undertaking to alter the existing statute, but merely to clarify and make more certain the meaning and effect of those sections. If, in so doing the construction which would otherwise have been given to sections 1763 and 1764 was, to some extent, changed by the new legislation, the modification of the earlier statutes was not an amendment of them, within the meaning of the Constitution." These cases and the later case of Evans v. Superior Court, 215 Cal. 58, 8 P.(2d) 467, follow the rule laid down in Hellman v. Shoulters, supra, to the effect that amendments by implication are not within the constitutional inhibition.

It is well established by the foregoing cases that the requirements of the Constitution apply only to statutes which are directly revised or amended. Purely consequential changes in the operation of other laws affected by new legislation, or amendment of old, are not within the provision.

[3] It is not claimed by appellant that the Legislature may not in one section of an act define words used in other sections, although carried to its logical conclusion such is the effect of the argument. This is a very common and proper legislative practice. The original section 4 of the 1931 act defined the words "person" and

"property." The amended section 4 did not change the definition of the word "person," but did change the meaning of the word "property." It could not well be contended that there was anything improper in this, but it is claimed that the section could not be amended effectively by merely defining the words "public officer," "officer," and "officers." It is said that if any other than a common definition of those words was to be used in the future, such result could only be accomplished by re-enacting section 1 so that the section, as re-enacted, would use, not only the words of the original section, but, in addition thereto, the words "deputy," "assistant," "agent," and "employee." But to give effect to this argument would apply the inhibition of the Constitution to situations which were not intended to be governed thereby. The word "section" as used in the Constitution means a section of an act. The cases provided for are those in which a law is revised or a section of a law is amended. If the provision of the Constitution is to be given a literal construction, we would have to say that the only section amended was section 4, and, inasmuch as that section was re-enacted and published as amended, the constitutional mandate has been fully complied with. The only direct amendment was of section 4. If we say that the amendment of section 4, by broadening the scope of section 1, impliedly amended the latter section, such implied amendment did not necessitate the re-enactment and publication of section 1.

[4] New and independent laws are not within the inhibition of section 24 of article 4 of the Constitution, amendments by implication are likewise excluded, as we have seen. The addition of new sections to a Code which change the operation of existing sections of the same Code does not necessitate a re-enactment of such other sections. People v. Peete, 54 Cal.App. 333, 202 P. 51. The constitutional provision does not mean that a section defining words and phrases cannot be amended so as to give to them a different meaning than they would have under the original definition, unless each law and section of a law containing such words and phrases is re-enacted, nor does it mean that there would have to be a re-enactment of all affected statutes if any words or phrases used therein should be given a new meaning by the addition of a new section to a statute in which such words or phrases were used. Appellant's position is not supported by any of the authorities cited. We are referred by appellant to numerous cases from other jurisdictions having constitutional provisions substantially the same as ours, which it is unnecessary to discuss except in a general way. The several jurisdictions in which they arose recognize the rule that amendments by implication are not governed by the requirement of the Constitution for re-enactment of amended statutes, but the amendments involved in the cases cited were held to be direct amendments, violative of the letter and spirit of the constitutional limitation. In none of them was there presented for decision the question of implied amendment of other sections of an act, accomplished by means of the amendment of a section, adopted in proper form, defining words and phrases used in the act. This class of legislation is different from most. For illustration, if we assume that a word defined in one of the comprehensive laws, such as the Corporate Securities Act or the Workmen's Compensation Act, should be redefined, such change might affect a great number of different sections of the act, but the re-enactment of those sections would be useless because their language would be the same although it would have been given a different meaning. And here, if section 1 of the act of 1931 had been re-enacted, it would have read the same as it did originally unless the new definitions were carried into it. To say that words used in a statute may not be defined and redefined in a single section of a law would be to condemn, for no sound reason, a legislative practice that is universally followed and, as far as we can see, has everything in its favor.

The title of the amending act was comprehensive. It clearly expressed the purpose of the amendment to enlarge the scope of the original act so as to include, in the requirement for filing claims, cases in which such filing had not been required theretofore. The entire act as presented to the Legislature for adoption was not deceptive, but, upon the contrary, substantially conveyed to the members of the Legislature the same understanding of its purpose that they would have had if the more elaborate and cumbersome procedure had been followed of inserting the amendatory definitions throughout the body of the act. We have quoted the title of the

amending act in full in order to point out that, where care is taken to comprehensively state in the title of such an act the broader scope being given, by a redefinition or a new definition, to words or phrases used in existing laws, no defeat or evasion of the constitutional inhibition is accomplished. The procedure contended for by appellant would result in endless and wholly unnecessary embarassment and confusion of lawmaking bodies if applied to amendments such as the one in question. The method followed by the Legislature, both in letter and in spirit, meets the constitutional requirement.

[5] It follows, therefore, that the claim of plaintiff for damages which he suffered through the alleged negligence of an employee of the defendant city was one which he was required, under the law as amended, to present and file as required by section 1 of the act. His failure so to do, within 90 days after the accident, constituted a valid defense to the action. Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.(2d) 185.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

11 Cal.App.2d 718

PEOPLE v. LAWYER.

Cr. 1870.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1936.

Hearing Denied by Supreme Court March 16, 1936.

1. Larceny ⇐45

In prosecution for stealing a cow, evidence of witnesses identifying stolen cow *held* admissible, notwithstanding cow was taken from accused's possession after his arrest and without his consent.

2. Criminal law ⇐997

Writ of error coram nobis was not available to accused convicted of stealing cow to correct alleged error in permitting witnesses to identify cow which had been taken from accused after his arrest without his consent, since alleged error should have been raised at trial and on appeal from judgment.

3. Criminal law ⇐997

Where statutes provide remedy to correct asserted errors, writ of error coram nobis will not lie.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Walter Lawyer was convicted of grand theft, and, from an order denying petition for a writ of error coram nobis, he appeals.

Affirmed.

Walter Lawyer, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

Appeal from an order denying a petition for a writ of error coram nobis. Appellant was tried and convicted on an information charging grand theft, stealing a cow. That judgment was affirmed. People v. Lawyer, 1 Cal.App.(2d) 1, 35 P.(2d) 1036. He made a motion to set aside the judgment, which was denied. That order was affirmed. People v. Lawyer (Cal. App.) 48 P.(2d) 722.

[1-3] On the appeal now before us, his contention is that he was denied due process of law "in so far as the cow was and is concerned"; the argument being that the trial court erred in admitting evidence of witnesses identifying the stolen cow, and in permitting the jury to view the cow, because it had been taken from his possession after his arrest, and without his consent. The authorities in the state uniformly hold that evidence obtained in that manner is nevertheless admissible; but the question is one of error at the most, which should have been raised at the trial when the evidence was introduced and then on the appeal from the judgment. Where the statutes provide such remedies to correct asserted errors, the writ of error coram nobis will not lie. People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Reid, 195 Cal. 249, 257, 232 P. 457, 36 A.L.R. 1435; People v. Superior Court (Cal.Sup.) 47 P.(2d) 724.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

11 Cal.App.2d 728

PEOPLE v. JACOBSEN.

Cr. 189.

District Court of Appeal, Fourth District, California.

Feb. 17, 1936.

Threats ⇐7

Evidence *held* to support conviction of extortion (Pen.Code, §§ 518, 519).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

John Jacobsen was convicted of extortion, and he appeals.

Affirmed.

W. M. Hahesy, of Tulare, and J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with the offenses of robbery and extortion, in obtaining $10.55 from Elmer L. Carlton. He was also charged with a prior conviction of a felony, which he admitted. The jury found him guilty of extortion and not guilty of robbery, and this appeal followed from the judgment pronounced upon him. He maintains that the evidence is not sufficient to support the verdict and judgment, and complains of alleged errors of law occurring during the trial.

The evidence discloses that defendant armed himself with a loaded rifle and went to the residence of Elmer L. Carlton and Robert Hayes and demanded the payment of $10.55; that the two men did not have the money; that defendant threatened them verbally and with his rifle; that Carlton told defendant he could get the money from his employer; that defendant marched the two men to the home of the employer, firing one shot over their heads about the time of their arrival there; that Carlton obtained the money from his employer and paid it to defendant; that this was done because of the threatening attitude and verbal threats of defendant which placed the two men in fear of their lives.

This evidence is ample to sustain the verdict and judgment under the provisions of sections 518 and 519 of the Penal Code.

We have examined the record, and can find no prejudicial error in it.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



11 Cal.App.2d 700

BRISSEL et al. v. CITY OF LOS ANGELES et al.

Civ. 5453.

District Court of Appeal, Third District, California.

Feb. 11, 1936.

Hearing Denied by Supreme Court April 10, 1936.

1. Municipal corporations ⇐493(6)

City council's order confirming and approving its levies for street improvement after property owners' objections thereto had been considered and overruled *held* conclusive, in absence of fraud or clear abuse of discretion (Gen.Laws 1931, Act 8198, §§ 17–19).

2. Municipal corporations ⇐493(1)

Amendment of levy for street improvement to relieve two-thirds of lots in district of levy *held* not to show fraud or abuse of discretion by city council, since council sits as quasijudicial board in determining merits of original assessment and in modifying levy (Gen.Laws 1931, Act 8198, §§ 17–19).

3. Municipal corporations ⇐493(1)

City council upon protests against assessment for street improvement *held* authorized to change levy by modifying various amounts imposed on respective properties within district or by relieving certain lots therein of all taxes formerly imposed to conform to board's reasonable determination regarding benefits to each parcel within district (Gen.Laws 1931, Act 8198, §§ 17–19).

4. Municipal corporations ⇐493(1)

Tax levy for street improvement *held* not invalid on ground that council upon protests modified levy by relieving two-thirds of lots in district from levy, where such lots were on extreme borders of district and lots bearing heaviest levy abutted on improvement (Gen.Laws 1931, Act 8198, §§ 17–19).

5. Municipal corporations ⇐493(5)

Where city council upon protests against levy for street improvement modified levy so as to relieve two-thirds of lots in district from levy, reviewing court could not

assume in absence of fraud or abuse of discretion that lots so relieved were benefited merely because they were within improvement district, especially where modification did not increase levy against lots abutting on improvement (Gen.Laws 1931, Act 8198, §§ 17–19).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Suit by George C. Brissel and others against City of Los Angeles and others. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Robert Young, of Los Angeles, for appellants.

Ray. L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Arthur Loveland and Robert J. Stahl, Deputy City Attys., all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment which was rendered against them in a suit to quiet title and to vacate a lien to secure the payment of special taxes levied against their properties situated in a municipal improvement district of Los Angeles created for the purpose of widening Highland avenue in that city. It is asserted the tax levy is invalid for the reason that it is the result of arbitrary, discriminatory, and grossly abused discretion on the part of the city council in relieving two-thirds of the lots in the district of practically all the taxes which were formerly imposed upon them, and by thus materially increasing the burden of taxes on plaintiffs' property.

The city of Los Angeles proposed to widen Highland avenue from 70 to 100 feet, being an increase in width of 15 feet on either side of the street. For this purpose a municipal improvement district was created as provided by law, including therein a tract of land 600 feet on either side of that avenue and approximately a mile and a half in length from Santa Monica boulevard to Cahuenga avenue, containing about 200 acres of land. Highland avenue is one of the chief thoroughfares of Los Angeles. That portion of the city, including the street improvement district which was established, is thickly populated. The terrain was created, platted, and divided into 1,117 separate lots or parcels of land, with streets, sidewalks, and modern city improvements. There are two tiers of blocks within the district on either side of Highland avenue. The lots within the district are practically all improved with substantial dwelling houses. The tract also contains a high school plant, numerous apartment houses, and business establishments. Most of these commercial properties front on Highland avenue. The lots bordering on this avenue, among which are the plaintiffs' properties, have a market value far in excess of the value of the more remote parcels.

The widening of Highland avenue was estimated to cost $2,203,101.28. The sum of $200,000 was first appropriated from the city funds to help defray the cost of the proposed street improvement. This left a balance of $2,039,101.28 to be raised by assessment on the properties within the district. Ordinance No. 63,382 of the city of Los Angeles was adopted and approved April 3, 1929, creating the assessment district and declaring it to be the intention of the city to widen Highland avenue, according to the plans and specifications on file as above related. July 2, 1929, Ordinance No. 64,238 of the City of Los Angeles was adopted approving the proposed street improvement, directing the work to be performed, and authorizing the assessment of taxes to be levied on the properties in the district in the manner provided by law to defray the expenses of widening Highland avenue. After due notice, the board of public works of the city of Los Angeles prepared and filed with the city council, as required by law, its detailed report of the proposed levy of taxes on the properties of the district. This report and plan of assessment provided for the raising of taxes to pay the cost of widening Highland avenue in the aggregate sum of $2,239,101.28, except that a credit in the sum of $200,000 was allowed on that account, which amount was appropriated from the funds of the city, leaving a balance of $2,039,101.28 to be raised by the levy of taxes. Of this last-mentioned sum, $124,222.14 was spread over and levied upon 836 lots consisting of two tiers of block bordering on the outskirts of the district and not fronting on Highland avenue. The taxes originally imposed on these 836 lots varied in amounts, but averaged approximately $148 to each lot. The remaining 281 lots or

parcels of land in the district were separately assessed for the balance of the remaining necessary sum to be raised, to wit, $1,914,879.14, in proportion to the benefits to be derived by each lot by virtue of the proposed improvement. This resulted in an assessment on plaintiffs' properties which border on Highland avenue, as follows:

Upon four lots owned by Brissel, at the rate of $2,885.65 per lot, the total sum of	$11,542.60
Upon one lot owned by Lingelbach, the sum of	5,018.52
Upon one lot owned by Price, the sum of	3,243.92
Upon one lot owned by Gloyd, the sum of	4,242.05
Upon one lot owned by Wells, the sum of	2,744.86
Upon one lot owned by Clara Hey, the sum of	2,994.39
Upon one lot owned by Steven Hey, the sum of	2,994.39
Upon two lots owned by Steven Hey, at the rate of $2,744.86 per lot, the total sum of	5,489.72
Upon two lots owned by Young, the total sum of	6,238.31

None of these plaintiffs protested against this tax levy within the time allowed by the statute. Other property owners in the district, however, did file objections to the assessments upon their properties. Pursuant to these protests, the council held a regular meeting in February, 1933, at which hearing the objections were considered, and the levy of taxes on the properties in the district were modified and changed as follows: In lieu of the $200,000 previously appropriated from the city funds toward the cost of widening the avenue, a total sum of $666,000 was appropriated for that purpose. On the theory that the group of 836 lots located at the outskirts of the district and not bordering on Highland avenue were not benefited by the proposed improvement, these lots were relieved of substantially all the taxes previously imposed upon them, aggregating the sum of $124,222.14. A nominal sum of one cent per lot, however, still remained on these 836 lots. The total amount of taxes to be levied remained as originally proposed at the sum of $2,239,101.28. The increased contribution from the city funds as above related left a balance of $1,573,092.92 to be levied on the 281 parcels exclusive of the 836 lots which had been practically relieved of all taxes, except for the nominal sum of one cent per lot. The sum of $1,573,092.92 was then apportioned to the remaining group of 281 parcels of land within the district according to the estimated benefits to be derived by each lot on account of the widening of Highland avenue. This change of assessment reduced the amounts originally levied against the plaintiffs' properties in a sum in excess of 15 per cent, notwithstanding the removal of taxes formerly assessed against the group of 836 lots. This substantial reduction of taxes was due to the increased contribution from the city funds. As so amended and changed, the city council approved and adopted the last-mentioned levy against the properties of the district.

For the first time these plaintiffs then filed protests against the amended levy, on October 26, 1933. It was contended the modified assessment was illegal and void for the reason that it was the result of arbitrary and gross abuse of discretion amounting to constructive fraud on the part of the council, chiefly for the reason that 836 lots constituting two-thirds of the parcels of land within the district, were relieved of practically all taxes which had been previously imposed upon them. A hearing upon these last-mentioned protests was duly set for November 13, 1933, at which time the plaintiffs' objections to the assessment were considered and overruled. The last-mentioned levy was then confirmed and adopted. This suit to quiet title and to declare the amended tax levy illegal and void was commenced by the plaintiffs. Findings were adopted favorable to the defendant. A judgment was accordingly rendered declaring the assessment valid, and holding that the plaintiffs were entitled to take nothing by this action. From that judgment this appeal was perfected.

[1, 2] We are of the opinion the amended levy of special taxes as adopted and confirmed by the city council of Los Angeles for the purpose of widening Highland avenue is valid. The regularity and validity of the proceedings which were followed in establishing the assessment district in this case are not questioned. The assessment was levied against the properties of the district pursuant to the provisions of the California Street Improvement Act. Stats.1903, p. 376, and amendments there-

to; 3 Deering's Gen.Laws of 1931, p. 4496, Act 8198. The assessment was levied by the Board of Public Works in the manner required by section 17 of that act and filed with the clerk of the city council of Los Angeles in October, 1932. The plaintiffs failed to file objections to the original assessment as required by section 18 of that act. The plaintiffs, however, filed protests against the levy as it was amended by the council, and their waiver for failure to object to the original assessment is not insisted upon. We may therefore consider the validity of the levy as amended by the city council and the effect of relieving two-thirds of the lots in the district of all taxes.

On November 13, 1933, the assessment, as amended, was duly confirmed and approved by the council after the plaintiffs' objections thereto had been duly considered and overruled. That order is final and conclusive in the absence of fraud or a clear abuse of discretion on the part of the council. We are of the opinion no such fraud or abuse of discretion appears from the mere fact that upon the hearing of objections to the assessment the levy was amended so as to substantially relieve the 836 lots included in the district from taxation. The council sits in the capacity of a quasijudicial board in determining the merits of the original assessment and in modifying the levy. 19 Cal. Jur. 221, § 546.

[3] Upon the hearing of the protests against the proposed assessment, the council was authorized to change the levy by modifying the various amounts imposed on respective properties within the district or by relieving certain parcels therein of all taxes formerly imposed upon them to conform to the board's reasonable determination regarding the benefits to be derived by each parcel within the district by virtue of the widening of Highland avenue. Section 19, Act 8198, supra; Johnson v. City of Los Angeles, 210 Cal. 240, 291 P. 395. Section 19 of the Street Assessment Act above cited provides in that regard: "Said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned. At such hearing the city council may remedy and correct any error or informality in the proceedings; may confirm, amend, alter, modify or correct the assessment in such manner as to it shall seem just."

[4] The tax levy is not invalid for the reason that the council at the hearing of the protests modified the assessment by relieving 836 lots within the district of substantially all the taxes which had been previously imposed upon them, even though that procedure resulted in increasing the taxes previously levied upon the properties of plaintiffs. Bailey v. City of Hermosa Beach, 183 Cal. 757, 763, 192 P. 712; Keller v. City of Los Angeles, 123 Cal.App. 99, 103, 11 P.(2d) 448, 450. In the case last cited it is said in that regard: "There is ample authority upholding the doctrine that the mere omission from the assessment of one or more lots fronting on the street does not of itself render the assessment void on its face."

Numerous authorities are cited in support of that statement of law. The Street Assessment Act above referred to does not require the imposing of taxes on each lot or parcel of land included within the district which is established. All that section 17 of that act requires is that: "Such assessment shall show the total sum to be raised thereby, as hereinbefore provided, and also the items of such total sum, and opposite each lot, piece, or parcel of land assessed, the amount assessed thereon, and the name of the owner thereof."

[5] In the present case it appears that the plaintiffs' properties are situated on Highland avenue, and we may therefore assume they would be chiefly benefited by the widening of that street. On the contrary, the 836 lots which were substantially relieved of the assessment upon amendment thereof are located at the extreme borders of the district and do not front on Highland avenue. There is no affirmative evidence that these last-mentioned lots will be benefited by the proposed improvement. We may not assume, in the absence of fraud or gross abuse of discretion on the part of the board, that these lots are necessarily benefited by the improvement merely because they were included within the boundaries of the district. On account of the increased appropriation from the city funds at the time of the amendments to the original levy, the assessments against the properties of the plaintiffs were not increased.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

12 Cal.App.2d 34

PEOPLE v. DALRYMPLE.

Cr. 324.

District Court of Appeal, Fourth District, California.

Feb. 20, 1936.

Homicide ⇐244(1)

Evidence *held* to support manslaughter conviction as against claim of self-defense.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Raymond Dalrymple was convicted of manslaughter, and he appeals.

Affirmed.

Harry H. Parsons, of San Bernardino, and Chas. G. Potter, of Redlands, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., and Albert E. Weller, Deputy Dist. Atty., both of San Bernardino, for the People.

MARKS, Justice.

By an information filed by the district attorney of San Bernardino county, defendant was accused of the crime of murdering Albie Karnes on June 28, 1935. He was found guilty of manslaughter, and has appealed from the judgment and from the order denying his motion for new trial.

Defendant owned twenty acres of land a few miles east of the city of San Bernardino. On the land were two small houses which defendant had rented to Albie and Orvel Karnes in May, 1935. There was also a garage with a room which defendant occupied as his living quarters. In the Karnes family were several brothers and a Mr. Mills, a father-in-law of one of them, but not all of them lived on the Dalrymple place.

A few days prior to June 28, 1935, defendant had made some beer which he and Orvel Karnes owned jointly. About the middle of the afternoon of that day, defendant was reclining on a couch in his yard which was in the rear of the house occupied by Orvel. While he was thus resting, Lester Karnes and Mills drove a truck into this back yard and left it standing between the house and the garage. They and defendant drank some of the beer. While they were drinking it, Orvel Karnes, his wife, and Clarence Karnes arrived at the place. Mrs. Karnes went into the house, and the two men joined the other three in the beer drinking. During this time, the matter of wrestling came up, and defendant and Lester Karnes nominated themselves as antagonists. Up to this point in the happenings of the afternoon, the evidence is in general accord. It contains sharp conflicts as to the ensuing events.

The jury evidently accepted as true the clear and convincing evidence of the witnesses for the people, and did not believe the story told by defendant while a witness in his own behalf. The people's witnesses portray the following:

Defendant and Lester Karnes commenced to wrestle. Defendant forced Lester to his hands and knees, getting a "choke hold" or "strangle hold" upon him. Orvel Karnes told defendant to wrestle fair and stop choking Lester. Defendant told Orvel to keep out of the match and struck Lester between the eyes with his fist and kicked him in the face with his heel. Orvel struck defendant in the face with his fist. Lester and defendant got to their feet and fought; several blows being struck by each. During the fight Orvel went over near the door of defendant's living room, and Clarence separated the fighters. Defendant broke away and, threatening to kill the Karnes, ran into his living room and secured a loaded double-barreled twelve-gauge shotgun. Orvel followed him in and grappled for possession of the gun. He called in his brother Clarence, and the two disarmed defendant. They took the gun to Orvel's house, where they were followed by Lester and Mills. They unloaded the gun; Clarence putting the shells in his pocket. The faces of defendant and Lester had been cut and bruised during the fight. This ended the first phase of the trouble, with defendant in his own living room, and all the Karnes in Orvel's house. During all this time, Albie Karnes had been in the living room listening to the radio and up to this point knew nothing about the fight.

Defendant sat on his bed for a few minutes and then armed himself with a .38 caliber revolver loaded with two good cartridges and one that had been snapped and had not fired. Thus armed, he went to a place near Lester's truck and walked back and forth muttering and looking to-

ward Orvel's house. About fifteen minutes after the first trouble had ended, Lester wanted to drive to his home in his truck. Albie volunteered to go out and talk to defendant. He went out of the house, followed at a distance of a few feet by Lester. The two thus approached defendant. When Albie was close to defendant, Dalrymple struck him with his left fist, drew his revolver with his right hand, and shot Albie in the neck, from which wound he died. As Albie fell to the ground, defendant shot Lester in the abdomen. Neither Albie nor Lester were armed with anything, and neither made a threatening movement or gesture towards defendant. On hearing the shots, the other members of the Karnes family ran from the house to the yard. Defendant cursed them, threatened to kill them, and pointed his revolver at them. They took refuge behind bushes and the truck, and one of the men called for the shotgun. On hearing this, defendant left and surrendered to a peace officer. He was taken to the county hospital, where his bruises and cuts were dressed. On the way he told the officers in charge of him that he had shot Albie and Lester and that he would have killed the Karnes family if he had possessed a sufficient number of cartridges.

Defendant relied on the defense of self-defense. He testified that just before the shooting he was standing at a faucet in his yard washing his face. One of his dogs growled, and he turned and saw Albie standing over him with a beer bottle in his upraised hand with Lester standing immediately behind him; that Albie struck, but that defendant warded the blow from his head at which it was aimed; that defendant retreated, but stepped into a ditch and fell prone on the ground; that Albie and Lester beat and kicked him and threatened to take his life; that he shot only to save his life or at least to save himself from serious bodily injury.

On the evening of June 28, 1935, defendant was interrogated by a deputy district attorney of San Bernardino county, and the questions and his answers were taken down in shorthand and transcribed by a court reporter. On that occasion he gave a very different account of the killing than the one which he detailed on the witness stand.

Defendant urges many errors in the acceptance and rejection of evidence, instructions to the jury, and arguments of the deputies of the district attorney. The comments of the trial judge on the evidence were within the rules laid down in People v. Talkington (Cal.App.) 47 P.(2d) 368. The arguments of the deputies of the district attorney were clear and forceful, there was nothing prejudicial in them and no exception was taken by defendant to any part of them. The charge to the jury was fair and correctly stated the law of the case.

We have studied the entire record, and can find nothing in it that would warrant a reversal of the judgment. The evidence of the guilt of defendant is clear and convincing. No good reason appears for an extended discussion of the many alleged technical errors of which defendant complains. None of them were prejudicial.

The judgment and the order denying a new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



11 Cal.App.2d 619

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1762.

District Court of Appeal, Fourth District, California.

Feb. 4, 1936.

Hearing Denied by Supreme Court April 2, 1936.

1. Master and servant ⇐417(7)

Industrial Accident Commission's finding that employee lost no time from his work as result of injury would be accepted as true where there was competent and material evidence in record supporting finding (St.1931, p. 2372).

2. Master and servant ⇐398

Application for compensation filed February 11, 1935, for injury sustained July 21, 1932, *held* not barred by six months' limitation where at time of injury employee was not incapacitated and did not discover that bone of wrist was broken until December 15, 1934, when he suffered second injury (St.1931, p. 2372, § 11).

Proceeding under the Workmen's Compensation Act by George Glantz, claimant, opposed by H. E. Jaynes & Son, employers, and the Continental Casualty Company, Insurance Carrier. To review an award of the Industrial Accident Commission of the State of California, the Insurance Carrier filed an application to review.

Award affirmed.

Hearing denied by Supreme Court; CURTIS and CONREY, JJ., dissent.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

MARKS, Justice.

George Glantz was employed as a metal worker by H. E. Jaynes & Son, whose compensation insurance carrier was the petitioner. About July 21, 1932, Glantz suffered an injury to his left wrist. This injury occurred in the course of, and grew out of, his employment. Glantz thought he had sprained his wrist, had it bound with tape, and continued with his work. He was not incapacitated for work for a period of seven days though he might have missed a few days' work owing to pain in this wrist. On December 15, 1934, he suffered a second injury to the same wrist. While working on the door of an automobile it fell, cutting the flesh on the wrist to the bone. He consulted a physician and X-rays were taken which disclosed an old fracture of one of the bones of the wrist which had not united. It is admitted that this fracture occurred in the accident of July 21, 1932. It was the conclusion of examining physicians that an operation was necessary to unite the two fragments of the bone.

On February 11, 1935, Glantz filed with the Industrial Accident Commission an application for the adjustment of his claim growing out of his first injury. During the hearing on this application, and on the advice of the commission, he filed an application for adjustment of his claim growing out of the injury of December 15, 1934. Two awards were made.

The award in question in this proceeding, involving the injury of July 21, 1932, provided in part as follows: "It is ordered that applicant take no disability indemnity presently by reason of the claim asserted herein. It is ordered that defendant insurance carrier furnish to said employee such medical, surgical and hospital treatment, including nursing and medicine as may be reasonable required to cure or relieve him from the effects of his injury; together with temporary disability indemnity during such period as he may be disabled by reason of such treatment. It is ordered that the defendant employer be discharged from liability herein and dismissed herefrom."

The award in the other proceeding resulting from the accident of December 15, 1934, which is also before us for review in a case bearing our Civil Number 1763, 54 P.(2d) 756, provides in part as follows: "Award is made in favor of George Glantz against Continental Casualty Company of necessary medical treatment to relieve and cure the employee of the effects of the injury to his left wrist, and the employee is hereby awarded temporary disability indemnity for such period that he may be required to stay away from work as the result of the injury herein, less seven days waiting period."

Petitioner urges in both cases that the proceedings are barred by the provisions of section 11 of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, p. 831, 841, as amended by St. 1931, p. 2372), as the proceedings were not instituted within six months following the fracture of the bone. Petitioner also urges in both cases that the two awards give Glantz double compensation for the same injury. We will consider the second contention in the opinion this day filed in the case bearing the same title as the instant case and our Civil Number 1763, involving the accident of December 15, 1934.

[1] The commission found that Glantz had been injured on July 21, 1932, but that as a result of the injury he "has lost no time from his work." There is competent and material evidence in the record supporting this finding, and we must accept it as true. It is clear that Glantz had no idea that he had a broken bone in his wrist until informed of that fact by physicians in December, 1934. He believed that his wrist had been sprained and that it was making a slowly progressive recovery.

When the limitation, imposed by the Workmen's Compensation Insurance and Safety Act of 1917, commences to run, is a question that is carefully considered and discussed in Marsh v. Industrial Accident Commission, 217 Cal. 338, at page 344, 18

P.(2d) 933, 936, 86 A.L.R. 563, where it is said: "'The law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn. The object is to make amends for a disability attributable to the employment, and the test is whether there is an incapacity causing loss of earning power in whole or in part. Hustus' Case, 123 Me. 428, 123 A. 514. In order to be compensable, disability need not be limited to incapacity of a workman to pursue his ordinary occupation, but embraces impairment of earning power generally. Gordon v. Evans, 1 Cal. Ind.Com. (pt. 2) 94; Savich v. Ind. Comm. [39 Ariz. 266], 5 P.(2d) 779. The term "injury" then is to be understood as connoting a compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. Dombrowski v. Jennings & Griffin Co., 103 Conn. 720, 131 A. 745. Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident. Acme Body Works v. Industrial Commission, 204 Wis. 493, 234 N.W. 756, 236 N.W. 378.

"'In De la Pena v. Jackson Stone Co., 103 Conn. 93, 130 A. 89, the court speaking of an occupational injury (but with a special exception of the law of Connecticut in mind) says: "A compensable personal injury is an abnormal condition of a living body which arises out of and in the course of the employment and produces an incapacity to work for the requisite statutory period. It need not be traced to a definite happening or event. It may be caused by accident or disease, and includes diseases peculiar to an occupation except those of a 'contagious, communicable or mental nature.' The happening or event includes the entire transaction to which the injury is traced, not only the operative causes, but their effect on the body of the injured person."

"'An injury, then, may arise out of, and in the course of, the employment, when there is a causal connection between the employment and the injury; but for purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before. Johnson v. London Guarantee & Acc. Co., 217 Mass. 388, 104 N.E. 735; Textileather Corp. v. Great American Ind. Co., 108 N.J.Law, 121, 156 A. 840. When a disease is latent and progressive, it may not culminate until a considerable time after the employment has terminated. So, if the disabling result is delayed, then the injury is correspondingly delayed, and the right to compensation does not accrue until the incapacity occurs.

"'Our Compensation Act expressly provides (St. 1917, p. 877, § 69) that it shall be liberally construed for the protection of persons injured in the course of their employment, and the purpose of such laws is to protect workmen, in proper cases, from economic insecurity. It is not surprising to find, therefore, that in those jurisdictions where occupational diseases are compensable, it is almost universally the rule that the injury is not deemed to occur until ascertainable disability results. And it may be noted that in our state it has been held that an employee is not to be deprived of compensation because he fails to make a correct medical diagnosis. Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.(2d) 142; Singer v. Industrial Acc. Comm., 105 Cal.App. 374, 376, 287 P. 567. The dependency of compensation on ascertainable disability is illustrated in a variety of cases, some being cited in the briefs and others gathered in our own research. In Nebraska the law allows for presentation of a claim a period of six months from the occurrence of the injury. In Selders v. Cornhusker Oil Co., 111 Neb. 300, 196 N.W. 316, the applicant, while at work in a cellar, was injured in the back by debris violently thrown against him by a flood of water. The injury was believed to be trivial at the time, and the claimant continued to perform his duties for a few weeks. Thereafter his health declined, but it was not until about nine months later that an X-ray picture disclosed the fracture of a lumbar vertebra. Application for compensation was then made and granted, the court holding that the time began to run only from discovery of his latent and previously unknown injury. A similar situation is exhibited in the recent case of Kostron v. American Packing Co., [227 Mo.App. 34] 45 S.W.(2d) 871. In McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N.W. 615, there was injury to a work-

man's head producing results which, though not immediately appreciable, became serious in course of time. In awarding compensation, the court spoke as follows:

"'"Accidents frequently occur where the true nature of the injury and the resulting disability are not discernible for a considerable time even with the aid of scientific skill. When latent injuries from accidents do not at first indicate disabilities which are compensable, an employee is not necessarily deprived of compensation under the Workmen's Compensation Act, Comp. St.1922, § 3056, for failure to demand his rights under the act before they can reasonably be ascertained. An accident resulting in an injury which proves to be progressive in its nature belongs to that class." Again in Travelers' Ins. Co. v. Ohler, 119 Neb. 121, 227 N.W. 449, an employee who received an electric shock, supposedly inconsequential, continued his work for upward of a year before he became incapacitated and had to cease; and in his case also compensation was allowed. Likewise in City of Hastings v. Saunders, 114 Neb. 475, 208 N.W. 122, the date of injury was declared to be the time of culmination in a compensatory disability.'"

[2] When we apply these rules to the instant case, we must conclude that the injury to Glantz occurred when it was discovered that he had a broken bone in his left wrist which would require an operation to cure, which would incapacitate him from working, and would justify a compensatory award. Prior to that time he did not know the nature of his injury, had not been prevented from working for the required period, and his earning capacity had not been seriously impaired. It is true that he suffered pain and did lighter work than before July 21, 1932, but he did not suffer a compensable injury at that time as defined by the Supreme Court in the Marsh Case. It follows that his application for compensation was not barred by the provisions of section 11 of the Workmen's Compensation Insurance and Safety Act of 1917, as amended.

The award in the instant case, bearing Claim Number 47004 of the Industrial Accident Commission, is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

11 Cal.App.2d 624

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1763.

District Court of Appeal, Fourth District, California.

Feb. 4, 1936.

1. Master and servant ⇐417(7)

Industrial Accident Commission's finding that injury caused employee no disability from labor up to time of hearing would be accepted as true, where finding was supported by competent and material evidence (St. 1931, p. 2372).

2. Master and servant ⇐387

Where employee did not discover that he had broken bone in wrist as result of injury in 1932, until subsequent injury in 1934, and in 1935 was awarded compensation for 1932 injury, award for 1934 injury was unnecessary where Industrial Commission found that employee lost no time from work as result of injuries, 1934 injury of itself was not compensable, and employee was fully compensated (St.1931, p. 2372, § 11).

Proceeding under the Workmen's Compensation Act by George Glantz, claimant, opposed by H. E. Jaynes & Son, employers, and the Continental Casualty Company, insurance carrier. To review an award of the Industrial Accident Commission of the State of California, the insurance carrier filed an application to review.

Award annulled.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

MARKS, Justice.

This is a companion case to one bearing the same title, 54 P.(2d) 753, which involved the claim of George Glantz for compensation for injuries received on July 21, 1932. The instant case involves the application of Glantz for compensation for injuries received in an accident on December 15, 1934. The facts of both cases are sufficiently set forth in our opinion in the other case and we do not need to repeat them here. We there disposed of petitioner's contention that both proceedings are barred by the provisions of

section 11 of the Workmen's Compensation Insurance and Safety Act of 1917, St. 1917, p. 831, 841, as amended by St.1931, p. 2372. There remains for us to here consider the contention of petitioner that, as the Industrial Accident Commission made an award in each proceeding allowing Glantz compensation for but one compensable injury, there is a double award for a single injury.

[1, 2] In the proceeding under review in the instant case involving the injury suffered on December 15, 1934, the commission found that the injury caused Glantz "no disability from labor up to the time of the hearing herein." This finding is supported by competent and material evidence and must be accepted by us as true. It is clear from the record in both cases that all that the commission intended to accomplish was to furnish Glantz with the necessary hospital, medical, and surgical attention and care necessary to join the two edges of the fractured bone, and compensation during the disability resulting from the operation. The injury of December 15, 1934, was not serious and resulted in no loss of time or pay. Of itself it is not a compensable injury. There is but one broken bone to repair, and Glantz is entitled to but one compensatory award, and that for the injury of July 21, 1932. That is fully taken care of in the award of the commission in the proceeding involving that injury. Any further award in the instant case is unnecessary, if not improper.

The award in the instant case, involving the accident of December 15, 1934, and bearing Claim Number 47318 of the Industrial Accident Commission, is annulled.

We concur: BARNARD, P. J.; JENNINGS, J.



PEOPLE v. JONES.*

Cr. 2829.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1936.

Rehearing Denied Feb. 27, 1936.

Hearing Granted by Supreme Court March 19, 1936.

1. Criminal law ⇐996(2)

Where defendant, while released on parole, was sentenced to penitentiary for life and adjudged an habitual criminal when he pleaded guilty to forgery and admitted three prior felony convictions, court was without authority, after more than 60 days had expired from defendant's return to penitentiary but within 60 days after expiration of prior sentence which defendant was serving when paroled, to modify judgment by substituting finding that defendant was not habitual criminal, since defendant commenced to serve life sentence when delivered to penitentiary (Pen. Code, § 1168, and § 644 as amended by St. 1935, p. 1699).

2. Stipulations ⇐17(3)

District attorney's erroneous stipulation as to conclusion of law *held* not binding on appellate court.

CRAIL, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Proceeding between the People and Charles B. Jones, wherein defendant filed a motion for modification of prior judgment. From an order in which former judgment was modified by substituting a finding that defendant was not an habitual criminal, the People appeal.

Order reversed.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

Charles B. Jones, in pro. per.

GOULD, Justice pro tem.

This is an appeal by the people from an order of the superior court in which a former judgment was modified by substituting a finding that defendant was not an habitual criminal.

An information was filed April 14, 1933, in which it was charged that defendant was guilty of the crime of forgery, with the additional charge that prior thereto he had thrice been convicted of felonies and had served a term of imprisonment for each of them. Upon his plea of guilty and admission of prior convictions, defendant on May 25, 1933, was sentenced to the state prison and adjudged an habitual criminal. At the time of the commission of the forgery charged in the information and at the time of the pronouncement of the sentence therefor, defendant was on parole from the state prison, having been released

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 59 P.2d 89.

during part of the term for which he had been sentenced on one of the prior convictions. In June, 1933, pursuant to the proceedings of May 25, he was returned to the state prison. The term which he was serving at the time he was released on parole would have expired October 13, 1935.

Defendant presented a motion in the superior court on November 15, 1935, for modification of the judgment of May 25, 1933. The district attorney stipulated that defendant "actually began the service of the term of imprisonment imposed by such judgment on October 13, 1935, that being the termination of the sentence which he was serving at the time he was paroled." On December 3, 1935, the court made the following findings and order: "That the actual commencement of imprisonment under the said judgment on May 25, 1933, did not begin until, and that it did begin on, October 13, 1935; that sixty days have not passed since said actual commencement of said imprisonment; and that this case of the defendant is an exceptional case: Now therefore the court finds and orders that the said judgment of May 25, 1933, be and the same hereby is, modified and/or amended by eliminating therefrom the finding that the defendant was an habitual criminal; and the court now finds, orders and provides that the defendant is not an habitual criminal."

The law in force on May 25, 1933, being a portion of section 1168 of the Penal Code as it then read, provided: "If any prisoner who has been released on parole outside of the prison buildings and inclosures by permission of the state board of prison directors shall commit any crime for which he is convicted and sentenced by the court, the sentence or sentences imposed on him for such crime shall commence at the expiration of the sentence he was serving when granted parole." Stats. 1931, p. 1057. Section 644 of the Penal Code makes provision for punishment of habitual criminals. That section was amended in 1935 (St.1935, p. 1699) to read as follows: "Every person convicted in this State of any felony who shall have been previously three times convicted, upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison, * * * either in this State or elsewhere, of the crime of * * * grand theft * * * forgery * * * or any of the aforementioned felonies, shall be punished by imprisonment in the State prison for life and shall not be eligible for release on parole; provided that in exceptional cases, at any time not later than sixty days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section." Before the amendment of 1935 the statute did not give to the court the discretion in exceptional cases to provide that the defendant should not be held to be an habitual criminal.

[1] The question before us is: When did defendant commence to serve the life sentence imposed May 25, 1933? If such sentence commenced upon his delivery to the penitentiary in June of that year, then the court was without authority in November of 1935 to modify its judgment by finding that defendant was not an habitual criminal, because such order may only be made "at any time not later than sixty days after the actual commencement of the imprisonment." If such imprisonment commenced at the termination of the prior sentence which defendant was serving at the time he was paroled, then the 60-day period would date from October 13, 1935, and the court's order was made within the time limit.

As noted above, the provisions with relation to the commencement of sentence upon expiration of the term being served when parole was granted, as in force at the time sentence was pronounced upon defendant herein as an habitual criminal, were found in section 1168 of the Penal Code. In People v. Vaile, 2 Cal.(2d) 441, 42 P.(2d) 321, 322, the Supreme Court has declared that the indeterminate sentence provisions of that section are inapplicable in the case of an habitual criminal. Therefore, inasmuch as "the law itself has set a sole, definite and unchangeable period of imprisonment" and "the only term of imprisonment permissible under the law was imprisonment for life without parole," we conclude that defendant herein actually commenced his imprisonment upon delivery to the penitentiary in June, 1933, and the court was without authority in November of 1935 to make the attempted modification of its previous order, even assuming, which we do not decide, that section 644 of the Penal Code as amended in 1935 was retroactive.

[2] The stipulation of the district attorney to the effect that defendant actually began service of his term of imprisonment October 13, 1935, being an erroneous stipulation as to a conclusion of law, cannot bind this court. People v. Singh, 121 Cal. App. 107, 8 P.(2d) 898.

The order appealed from is reversed.

I concur: CRAIL, P. J.

WOOD, Justice.

I dissent. At the time of the commission of the offense for which sentence was pronounced, defendant was on parole from the state prison in accordance with the provisions of section 1168 of the Penal Code, wherein it is provided that "prisoners on parole shall remain under the legal custody and control of the state board of prison directors and shall be subject at any time to be taken back within the inclosure of the prison." A part of the section, in force at that time, provided that, if a prisoner while on parole should commit a crime and be sentenced therefor, the sentence imposed for such crime must "commence at the expiration of the sentence he was serving when granted parole." Defendant was in the legal custody of the prison directors both before and after the sentence of May 25, 1933. Upon his return to the prison, he was entered on the records as a parole violator, his term on the latest sentence to commence upon the expiration of the old term, October 13, 1935. The statement in the majority opinion that he was returned to prison "pursuant to the proceedings of May 25," 1933, does not, in my opinion, completely cover the point. If defendant had been taken directly to prison as a parole violator, without a new prosecution in court, he undoubtedly could and would have been legally confined until October 13, 1935. The sentence of May 25, 1933, was not made to run concurrently with any other sentence, and could not be effective to cut off his imprisonment for the remainder of the old term. Under the law in force at the time, it was the duty of the warden to confine defendant for the remainder of the term he was serving when granted parole. The sentence of May 25, 1933, commenced thereafter.

The case of People v. Vaile, cited in the majority opinion, is not decisive of the issue now before us. The defendant in that case was not a parole violator, and the date of the "actual commencement of imprisonment" was not in issue. It will be noted that in the Vaile Case the court stated that under the circumstances of that case "the indeterminate sentence provisions of section 1168 of the Penal Code are inapplicable." The part of section 1168 prescribing the date of commencement of the latest sentence is not one of the indeterminate sentence provisions of the section.

The order from which the appeal is taken was made within 60 days from the time of the actual commencement of imprisonment under the sentence of May 25, 1933, and the court doubtless had authority to make the order if the provisions of the amendment of 1935, in effect at the time, were applicable to a judgment pronounced before the enactment of the amendment. The Legislature is authorized to enact laws fixing penalties and procedure to be applied. Such amendments will be enforced after their enactment unless they deny defendant his constitutional right to be free from punishment imposed by ex post facto laws. In the case In re Lee, 177 Cal. 690, 171 P. 958, 959, the court said: "If the purpose of the law is to mitigate the punishment, the law is not ex post facto, unless it can clearly be seen that, notwithstanding the beneficence of the law, it may result in the individual case in depriving the prisoner of some well-defined right." It is manifest that the amendment of 1935 was passed for the purpose of mitigating punishment, and that it did not deprive the defendant of a constitutional right. The court retained jurisdiction to modify the judgment and properly exercised its discretion under circumstances which, as disclosed by the record, were amply sufficient to establish the exceptional nature of the case.

11 Cal.App.2d 750

ROGERS v. MARION et al.

Civ. 10717.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1936.

1. Judges ⇐36

Person dissatisfied with judicial determination of judicial officer cannot maintain civil action against such officer.

2. False imprisonment ⇐7(2)

False imprisonment action could not be maintained against township justice of peace on ground that justice maliciously and without probable cause, and knowing that complaint and affidavit for arrest were false, issued warrant for plaintiff's arrest and thereby caused his unlawful imprisonment.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Kent C. Rogers against Myer B. Marion and others. From the judgment, the plaintiff appeals.

Affirmed.

Barry Sullivan and Monta W. Shirley, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Douglas De. Coster, Chief Deputy, Co. Counsel, both of Los Angeles, for respondent Marion.

GOULD, Justice pro tem.

This suit, directed against a township justice of the peace, seeks damages upon allegations that the latter maliciously and without probable cause, and knowing that the complaint and affidavit for arrest were false, issued a warrant for plaintiff's arrest and thereby caused the latter's unlawful imprisonment. Demurrer was sustained without leave to amend, and plaintiff appeals from the judgment which followed.

[1, 2] The lower court ruled correctly. The law grants to a judicial officer immunity from civil actions by persons dissatisfied with his judicial determinations. Cooley on Torts (3d Ed.) vol. 2, p. 795, contains a statement of the principle in these words: "Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer."

We also quote from the case of Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001, 1002, as follows: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it."

Many cases on the subject are collated and reviewed in Pearson v. Reed (Cal. App.) 44 P.(2d) 592, 597, which extends the immunity to the public prosecutor of the city of Los Angeles; and there it is well stated that there can be no middle ground in the matter—that "either all such suits are to be tolerated or none." With that principle we agree, and hold that the situation in the case before us, which appellant urges as sufficiently exceptional to take it out of the usual rule, does not call for any deviation from the accepted doctrine. That the rule extends to inferior courts is held in Ceinar v. Johnston, 134 Cal.App. 166, 25 P.(2d) 28.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

11 Cal.App.2d 734

FOYE et al. v. BOARD OF TRADE OF SAN FRANCISCO et al.

Civ. 9774.

District Court of Appeal, First District, Division 2, California.

Feb. 18, 1936.

1. Money received ⇐10

Plaintiffs who turned money over to defendants for distribution to third persons releasing claims against plaintiffs, with understanding that any of such money not distributed within two months should be repaid to plaintiffs, could not recover from defendants money not distributed, where defendants obtained release of claims of all third parties against plaintiffs.

2. Release ⇐55

Release to which was attached creditor's name and signature of individual signing creditor's name would be presumed to be in ordinary course of business (Code Civ. Proc. § 1963, subd. 20).

3. Money received ⇐18(1)

Plaintiffs seeking to recover undistributed portion of money turned over to defendant for distribution to third persons executing releases of claims against plaintiffs, on ground that releases obtained from some of third parties were unauthorized, had burden of proving that such releases were unauthorized, notwithstanding that plaintiffs pleaded a common count (Code Civ.Proc. § 1869).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Charles E. Foye and another against the Board of Trade of San Francisco, a corporation, and the Board of Trade of San Francisco, an unincorporated association. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Livingston & Livingston, of San Francisco, for appellants.

Grant H. Wren and Norman A. Eisner, both of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs commenced an action against the defendant on a common count for moneys had and received for the use of plaintiffs. After the cause had been fully tried, the trial court made findings in favor of the defendant, and from the judgment entered thereon the plaintiffs have appealed. Prior to July 5, 1933, Joseph Rosenberg and Isidore Rosenberg, under the fictitious name of California Restaurants Company, had been conducting that certain restaurant known at Taits at 24 Ellis street, San Francisco. The building is owned by the plaintiffs. The latter held a chattel mortgage on the furnishings. The Rosenbergs became seriously involved financially, and owed large sums to numerous creditors for merchandise, numerous employees for services rendered, and the Mullen Manufacturing Company for the balance due on a conditional sales contract. An oral agreement was made, by the terms of which the plaintiffs agreed to advance $4,047 for the payment of the debts of the Rosenbergs, and the latter agreed to surrender immediate possession of the premises to the plaintiffs or their assigns. The record does not disclose any written instrument which purports to state the agreement above referred to; however, the plaintiffs place much reliance on a document executed by the defendant board which is in words and figures as follows, to wit:

"Received of Charles E. Foye and Vera M. Brady the sum of Four Thousand Forty-Seven Dollars ($4047.00). Of said amount Seven Hundred Ninety-Six and 06/100 Dollars ($796.06) was paid on June 28, 1933, and receipt was issued therefor. The balance of said sum, towit, Three Thousand Two Hundred Fifty and 94/100 Dollars ($3250.94) is being paid contemporaneously with the execution of this agreement.

"Said money has been or shall be used, first, to pay duly established labor claims of employees of California Restaurants Co., Taits, Joey Rosenberg, Joseph Rosenberg and/or Isidore Rosenberg in connection with the enterprise heretofore conducted at 24-26-28 Ellis street, San Francisco. The balance of said sum shall be used to pay creditors of said enterprise pro rata. Any and all of said payments shall be made upon the following conditions:

"First: that labor claims shall be paid in full upon execution of the receipts hereinafter provided for.

"Second: that fifty per cent (50%) of the amount due Mullen Manufacturing Company on a conditional sales contract approximating Five Hundred and Fifty Dollars ($550.00) shall be forthwith paid to said corporation upon the execution of the document hereinafter provided for.

"Third: the balance shall be distributed pro rata to all of the creditors of said enterprise upon execution of the document hereinafter described.

"The documents described in the paragraphs first, second and third above shall include a receipt and release in full of any claims and demands of any kind or character addressed to Charles E. Foye, Vera M. Brady, William O'Hare and the partnership of Livingston & Livingston and the members thereof, and shall also include a relinquishment of any and all interest in and to any property located at the above address at any time whether as creditor or in any other capacity, and a consent to and acquiescence in the sale of said property by Joseph Rosenberg to William O'Hare, and a waiver of any and all right to proceed against said property by attachment, execution or any other type of claim for any cause or in any manner.

"Any money not so distributed within two months from date hereof shall be repaid to Charles E. Foye and Vera M. Brady and to Livingston & Livingston, their attorneys.

"In the event that any of the parties to whom said receipts and releases are to run shall be indebted to any creditor above mentioned on account of any transaction totally disconnected from any enterprise connected with the business at 24–26–28 Ellis street, San Francisco, then any such receipt or release may specifically exclude such other indebtedness from its operation.

"Dated: July 5, 1933.
"Board of Trade of San Francisco
"By Grant H. Wren, Its Attorney
"By J. M. Connor." (Italics ours.)

The plaintiffs call attention to the italicized paragraph and to the fact that the evidence discloses that the money was not distributed within two months, nor within the period of the lawful extension given therefor, and thereupon they assert that ipso facto they were entitled to the return of the $2,392.11, that being the balance of the funds held by the defendant at the time this action was commenced. The defendant board replies that the plaintiffs were not entitled to be paid any part of said sum, because on said date the creditors, one and all, had executed, and the defendant held, releases from each and every one of the creditors as provided in said receipt. The plaintiffs reply that the releases were informal, and many of them on their face did not show that the signer was authorized to execute the release signed by him, and, furthermore, that under the terms of the instrument hereinabove set forth the plaintiffs were entitled to the moneys which they claimed because the uncontroverted fact was that such moneys had not been "distributed" as provided in said instrument.

[1] Taking up the claim to be repaid all that portion of the funds not "distributed" on the date the action was commenced, we think it is quite clear that it may not be sustained. The paper dated July 5, 1933, was but a formal receipt. By its terms the defendant received from the plaintiffs certain moneys for the benefit of a large number of third parties. The latter had executed documents which at least purported to be releases. By so doing they executed at least purported acceptances of the agreement made in their behalf. Indeed, the plaintiffs did not even question the validity of the releases executed by the former employees. All of those claims have been paid. Neither did they question some of the other releases, one of which was the claim of Mullen Manufacturing Company, which has been paid. However, they strenuously questioned some of them, and assert that the contract directly authorized the plaintiffs to receive back their moneys on a date certain, if such moneys had not been distributed. If the fact were that, instead of some of the releases being altogether formal and sufficient, all of them had been entirely sufficient, and nevertheless the defendant had not distributed the fund, we think it is clear that the plaintiffs would hardly make the claim which they are now making; in other words, the omission or neglect of the defendant to pay over the moneys under such circumstances could not be considered under the terms of the contract a termination of the rights of the creditors, and the latter could have maintained against the defendant an action as for moneys had and received.

[2, 3] We come now to a consideration of the claim that the signatures to certain releases were so informal as not to comply with the provisions of the document signed by the defendant. The document does not contain any particular provision as to what evidence should be tendered the defendant showing the authority of any person or persons to sign the name of any one of the creditors. As hereinabove recited, it is a conceded fact that a purported release was tendered by each and every creditor. As each release was tendered,

having attached thereto the name of the creditor and the signature of the individual signing the creditor's name, it will be presumed that the ordinary course of business has been followed. Code Civ.Proc. § 1963, subd. 20. The authenticity of that signature was addressed to the defendant. 21 C.J. 878–879; Henderson v. Johns, 13 Colo. 280, 22 P. 461, 463. No evidence was produced that any certain release was not duly authorized. The plaintiffs contend no duty rested on them to make such proof. In making that contention, we think they are mistaken. In pleading a common count, they did not escape any burden of proof which would have rested on them had they pleaded the facts. If they had pleaded the facts, it is clear they would have been called upon to prove that at least some of the creditors did not tender the releases mentioned, and that the fund had not been distributed, and that the plaintiffs were entitled to recover the fund; in other words, certain negative allegations would have been material elements in their cause of action. Under those circumstances, it is statutory that the plaintiffs would be bound to prove such negatives. Code Civ.Proc. § 1869. That burden was not avoided by the form of pleading adopted by the plaintiffs.

Both in the trial court and in this court much was said to the effect that the defendant did not collect any sum from the Rosenbergs. That fact is wholly immaterial in this case. Under the terms of the instrument hereinabove set forth, the defendant did not contract to make any such collections.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



PEOPLE v. TRIPPELL.*

Cr. 2742.

District Court of Appeal, Second District, Division 1, California.

Feb. 20, 1936.

Hearing Granted by Supreme Court March 19, 1936.

1. Criminal law ⇐1153(2)

Finding of trial court that 5½ year old girl was qualified to be sworn as witness in prosecution for indecent assault committed against her *held* conclusive, where record did not affirmatively show that trial court had abused its discretion (Pen.Code, § 288).

2. Infants ⇐20

Evidence sustained conviction for indecent assault against 5½ year old girl (Pen. Code, § 288).

3. Criminal law ⇐260(11), 1159(4)

Judgment based upon jury verdict or trial court's decision against defendant, in prosecution for indecent assault against child, is conclusive, unless child's testimony is manifestly false or inherently improbable (Pen.Code, § 288).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Al Trippell was convicted of an indecent assault against a child, and he appeals.

Affirmed.

Al Trippell, Charles B. Taylor, of Los Angeles, and O. F. Meldon, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From a judgment of conviction on each of two counts of the offense denounced by the provisions of section 288 of the Penal Code, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

[1] The victim of defendant's alleged felonious assault was a girl of the age of about 5½ years. On the trial of the action, because of the extreme infancy of the child, she was questioned at length by the trial judge touching her qualifications to be sworn as a witness. It would be a waste of time to herein set forth the details of that examination. Although the question as to whether the child was really qualified as a witness may readily be one regarding which reasonable men might differ one from the other, nevertheless, since the record does not affirmatively establish the fact that the trial judge abused his discretion in the matter, his conclusion thereon must be accepted as final and conclusive, from which it follows that the specification by appellant of prejudicial error in that regard cannot be sustained.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 61 P.2d 929.

[2, 3] And the same principle prevails with reference to the sufficiency of the evidence to support the judgment. Judging from the "cold record," the testimony given by the child was most unsatisfactory. Time and again, that in important particulars in her testimony she was manifestly mistaken was clearly established; and on each of several different occasions, if she did not admit that her testimony in some particular was false, such a conclusion was inevitable. Both she and her mother admitted that in some respects the mother had instructed the child concerning at least what she should say on her voir dire examination. In addition thereto, the reputation of the mother in some respects was seriously impeached. By independent witnesses, in substance, it was testified that the mother had a mercenary motive in the prosecution of the defendant, in that before he had been accused of the commission of the offense the mother had broadly stated, in effect, that, if she could get "something on" defendant, she could extort money from him. Besides that, it was testified that on several different occasions she had made somewhat questionable advances to defendant, in which she had been uniformly repulsed by him. But, notwithstanding such unsavory conditions, it was within the province of the trial judge, who, of course, had the witnesses before him, with the attendant opportunity to judge of their truthfulness regarding the essential facts, to finally determine where the truth lay; and in that connection, in substance, it was his conclusion that, in spite of the adverse and unfavorable conditions that surrounded the testimony that was given by the child, her testimony was to be preferred to, and should prevail over, that presented by defendant, whose reputation, especially in line with the offense of which he had been accused, apparently was untarnished and unimpeachable. In cases of this sort, wherein the sufficiency of the evidence is relied upon as a reason for the reversal of the judgment, the law is well established that, unless the testimony given by the child is manifestly false or inherently improbable, a judgment that is based upon a verdict returned by a jury or a decision rendered by the trial judge against the defendant is conclusive on appeal. In that regard it is impossible for this court to say that the foregoing drastic condition, necessary to the reversal of the judgment, obtains.

None of the other errors specified by appellant is worthy of serious consideration.

The judgment and the order by which defendant's motion for a new trial was denied are affirmed.

We concur: YORK, J.; DORAN, J.



11 Cal.App.2d 720

SANTOS v. DONDERO.

Civ. 5542.

District Court of Appeal, Third District, California.

Feb. 17, 1936.

Hearing Denied by Supreme Court April 16, 1936.

1. Forfeitures ⇐1

State has right to declare a forfeiture of property used in commission of a criminal offense upon conviction of such offense.

2. Constitutional law ⇐303

Upon question as to whether criminal act upon which forfeiture to the state is predicated has been committed, owner of forfeited property is entitled to due process, and, before his title can be extinguished, it must be judicially determined that the act giving rise to forfeiture occurred.

3. Game ⇐10

Plea of guilty to charge of using artificial light in hunting game mammals subjected accused to punishment imposed by law, including, within discretion of justice of the peace, the forfeiture of any device capable of being used to take the mammals which was used in committing the offense.

4. Justices of the peace ⇐130

There are no presumptions in favor of judgments of the justice court (Code Civ. Proc. § 1963, subds. 15, 16).

5. Justices of the peace ⇐130

One who relies upon judgment of justice court or asserts right thereunder must affirmatively allege and prove all facts necessary to confer jurisdiction, and, if want of jurisdiction appears, the judgment is void (Code Civ.Proc. § 1963, subds. 15, 16).

6. Justices of the peace ⇐129(3)

A judgment in excess of jurisdiction of a justice court is subject to collateral attack, even where the action was cognizable in such court.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Statutes ⇦197

Rule of statutory construction that, whenever necessary to arrive at evident intent of statute, courts will substitute "or" for "and" and vice versa, can only be resorted to where the act itself furnishes cogent proof of the legislative error.

8. Game ⇦10

Word "and" used in statute allowing forfeiture of device used in unlawful hunting of game, where device was capable of being used "and" designed to be used to take game, could not be construed as "or" (St.1933, pp. 494, 509, §§ 1151, 1414).

9. Game ⇦10

Where accused pleaded guilty to charge of using artificial light in hunting game, automobile to which spotlight used in hunting the game was attached was not a "device or apparatus designed to be and capable of being used to illegally take game" within statute so as to authorize forfeiture of accused's automobile (St.1933, pp. 494, 509, §§ 1151, 1414).

10. Game ⇦10

Word "light" as used in statute declaring it an offense to use an artificial light to assist in taking game means instrument through which illumination is projected and not motor vehicle to which light is illegally affixed (St.1933, pp. 494, 509, §§ 1151, 1414).

[Ed. Note.—For other definitions of "Light; Lighting," see Words & Phrases.]

11. Forfeitures ⇦1

An intention to confiscate property will not be indulged in by aid of constrained construction, where purpose of Legislature clearly appears otherwise.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Frank Santos against David Dondero. From an adverse judgment, the plaintiff appeals.

Reversed.

Lovett K. Fraser, of Lakeport, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for respondent.

LEMMON, Justice pro tem., delivered the opinion of the court.

Appellant entered a plea of guilty in the justice's court of township 3, Lake county, to a charge of using artificial light in night hunting of game mammals in violation of section 1151 of the Fish and Game Code (St.1933, p. 494). By the judgment and sentence pronounced upon the plea, the justice's court ordered that certain personal property, including a Ford coupé automobile, be forfeited to the fish and game commission, and the defendant herein, a game warden, in pursuance thereof, took the automobile into his possession. An action in claim and delivery against the game warden, defendant herein, was thereupon instituted in the superior court of Lake county by appellant, to recover the possession of the automobile, or its value. From a judgment adverse to him, appellant prosecutes this appeal.

It appears that the appellant, in the commission of the offense charged against him, used a spotlight which was attached to the automobile in question. Section 1414 of the Fish and Game Code (St.1933, p. 509) provides in part: "The judge or justice before whom any person is tried for a violation of any provision of this code may, in his discretion, upon the conviction of the accused, order the forfeiture of any device or apparatus designed to be, and capable of being used, to take birds, mammals or fish, and which was used in committing the offense charged."

[1-3] Appellant points out that the justice's court complaint did not charge him with the use of the automobile in the commission of the offense, and deduces that the order of that court deprived him of property without due process of law. The right of the state to declare a forfeiture of property used in the commission of a criminal offense upon the conviction of such offense is too well settled to require a review of authorities. Upon the question as to whether the act upon which the forfeiture is predicated has been committed, the owner is entitled to due process of law, and, before his title can be extinguished, it must be judicially determined that the act or event giving rise to the forfeiture occurred. State v. Peterson, 201 Wis. 20, 229 N.W. 48. The plea of guilty to the charge subjected the defendant to any punishment or penalty provided, and which may be imposed by law for the violation of the statute, including (in the discretion of the justice of the peace) the forfeiture of "any device or apparatus designed to be, and capable of being used, to take birds,

mammals or fish, and which was used in committing the offense charged."

It is urged by appellant that the justice of the peace exceeded his jurisdiction in ordering the forfeiture of the automobile. Respondent replies that the questions as to whether the automobile was a device or apparatus designed and capable of being used, and actually used in the illegal taking of game, were for the justice of the peace to decide, and the judgment of his court cannot be collaterally attacked.

[4-6] No presumptions in favor of the judgments of a justice court can be indulged in. The presumptions declared by subdivisions 15 and 16 of section 1963 of the Code of Civil Procedure apply to the judgments of courts of general jurisdiction, but not to judgments of inferior courts or courts of limited and special jurisdiction. Estate of Sharon, 179 Cal. 447, 177 P. 283. A party who relies upon the judgment of a justice's court or asserts a right thereunder must affirmatively allege and prove all facts necessary to confer jurisdiction. If a want of jurisdiction appears, the judgment is void. It necessarily follows that a judgment in excess of jurisdiction of such a court is subject to collateral attack, even where the action was cognizable in such court. Brush v. Smith, 141 Cal. 466, 75 P. 55; Reed v. Bernal, 40 Cal. 628.

[7, 8] It is to be noted that in the description of the property which may be forfeited, set forth in section 1414 of the Fish and Game Code, the clauses are conjunctive. The device or apparatus must not only have been used in the commission of the offense charged, but it must also be capable of being used, "and" designed to be used, to take birds, mammals and fish. Obviously, an automobile is not "designed" for such purpose. While it is true that, wherever necessary to arrive at the evident intent of the statute, courts will substitute "or" for "and," and vice versa, this exceptional rule of construction can only be resorted to where the act itself furnishes cogent proof of the legislative error. State v. Tiffany, 44 Wash. 602, 87 P. 932. The Legislature apparently intended to draw a distinction between property not designed or intended primarily to be used in hunting and fishing, but which might be incidentally used in such pursuits, and property manufactured for these definite purposes. There is nothing in the context or the words used which justify the giving to the word "and," as there used, a disjunctive construction.

[9-11] If it were to be conceded, as appellant apparently concedes, that the spotlight is a device or apparatus proscribed by the statute, we must, before concluding that the judgment of the justice of the peace complained of was within his jurisdiction, hold that the automobile to which the spotlight was attached is also such a device or apparatus Section 1151 of the Fish and Game Code, which declares it an offense to use an artificial light to assist in taking game birds or mammals or game fish, defines artificial light as "any light which is not legally affixed to a motor vehicle," etc. The intent to distinguish the artificial light as something distinct from the motor vehicle is apparent. The device or apparatus within the prohibition is the light illegally affixed. The word "light" means the instrument through which the illumination is projected, and not the motor vehicle. An intention to confiscate property will not be indulged in by the aid of the constrained construction asserted by respondent, where the purpose of the Legislature appears clearly otherwise.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



PEOPLE v. WELSH.*

Cr. 2832.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1936.

Hearing Granted by Supreme Court March 19, 1936.

Criminal law ⇐830

Where jury could have found that offenses committed constituted larceny rather than robbery, refusal of larceny instruction *held* reversible error, where requested instruction, although partially objectionable, sufficiently indicated accused's desire for instruction upon lesser and included crime of larceny.

CRAIL, P. J., and WOOD, J., dissenting in part.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 124.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Frederick Timothy Welsh was convicted of robbery, attempted rape, and kidnapping for the purpose of robbery, and he appeals.

Reversed in part, and affirmed in part.

Clair V. Eberhard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Four nocturnal forays in the course of which, the prosecution charged, he robbed and molested four different women, brought defendant before a jury upon eight felony counts. Upon trial he was convicted upon six counts, four for robbery, one for attempted rape, and one for kidnaping for the purpose of robbery, and was acquitted upon two counts of attempted kidnaping for the purpose of robbery. From the conviction and from an order denying a motion for new trial, defendant appeals.

While the court correctly instructed the jury upon the crime of robbery, appellant complains that it refused a requested instruction upon the lesser and included offense of larceny. Such requested instruction read as follows: "Thus, if property be taken by stealth through a larceny and the owner, in his endeavor to regain his property, is deterred therefrom and resisted by force or fear, the crime is merely larceny. The force used must be more than required to consummate a mere larceny of property taken. Thus, snatching property from the hand of another would be larceny and not robbery."

Portions of the requested instruction may be objectionable as being not a correct statement of the law, but the requested charge sufficiently indicated appellant's desire that the court instruct upon the lesser and included offense of larceny. Refusal to so instruct, appellant claims, was prejudicial, because the jury might well have found from the evidence that the offenses committed constituted larceny rather than robbery. We agree with appellant's contention in this regard, that the refusal to instruct upon the lesser and included offense of larceny was error. As stated in People v. Church, 116 Cal. 300, 48 P. 125, 126: "Again, in every trial upon a charge of robbery, where the evidence justifies it, the court should of its own motion, in the absence of request upon the part of counsel, inform the jury that larceny is included in the offense of robbery, and that their verdict may be framed upon those lines. While this court has refused to set aside verdicts by reason of the trial court's failure to so instruct, holding that the defendant has no cause of complaint where he sits idly by without request upon his part to give the instruction, still, the better practice, and the only strictly correct practice, is for the court to inform the jury of all offenses which are necessarily included in the principal offense charged."

Appellant also urges that the evidence is insufficient to convict upon any ground. Perusal of the record discloses ample evidence to justify the verdict as to the count of attempted rape and the count of kidnaping for the purpose of robbery.

The judgment and order are reversed upon the four counts of robbery, Nos. II, IV, VI, and VIII, and are affirmed as to count I kidnaping for the purpose of robbery, and count III, attempted rape.

WOOD, Justice (dissenting in part).

I concur as to counts II, III, IV, VI, and VIII, and dissent as to count I, in which defendant is accused of kidnaping Agnes M. Wyatt for the purpose of robbery. By section 209 of the Penal Code kidnaping for the purpose of robbery is made a felony, but kidnaping for the purpose of larceny is not mentioned in the section. We are reversing the conviction as to count II for the reason that the trial court erred in refusing an instruction defining larceny. Since the refused instruction should have been given on the issue of count II, it should also have been given on the issue of count I, in order to enable the jury to determine if the defendant kidnaped the complaining witness for the purpose of robbery or for some other purpose. The complaining witness testified that she had been forced into an automobile; that defendant later, while sitting in the automobile parked by the curb, offered to pay her for sexual relations; that she had a purse containing a compact, handkerchief, a package of cigarettes and some money; that defendant took her purse, opened it, took out the cigarettes, began smoking them and returned the purse with the other contents. The defendant testified that the prosecutrix entered his car voluntarily and that he did not take her purse or cigarettes. Under these circumstances it was error to

refuse the offered instruction. People v. Church, supra.

CRAIL, Presiding Justice (dissenting in part).

I concur in those parts of Judge GOULD'S opinion which support the judgment. I dissent from all parts of either opinion which seek to reverse the judgment, for I am in favor of affirming the judgment on all counts.

The majority are reversing the conviction as to the four counts of robbery for the reason that the trial court erred in refusing an instruction defining larceny; but in my opinion the court did not refuse an instruction defining larceny. The sentences which are quoted in the opinion and which the court refused to give were merely the tail-end of an instruction which defines robbery; and it may not be reasonably said that because the word "larceny" is used therein it is an instruction defining larceny. On the contrary, the defendant in his brief admits over and over again that he made no request for an instruction on larceny. The part of the instruction which was refused contains bad law and should not have been given. To say that snatching property from the hand of another would be larceny and not robbery is not good law, for it would depend upon all the facts and circumstances in evidence bearing upon the question of the force or fear used whether or not it would be larceny or robbery.

It is the settled law of California that a failure of the court to charge a jury respecting the law of lesser offenses included in the offense charged will not constitute reversible error in the absence of a request for such an instruction. See cases collected in 8 Cal.Jur. 311, note 6; 22 Cal.Jur. 886. While the authorities relied upon by the defendant say that it is the "better practice and the only strictly correct practice" to instruct on the included lesser offenses, they do not hold that a failure to do so constitutes reversible error. On the contrary, they hold that such an omission is favorable error, for the reason that it will not be presumed that the jury would convict of the higher offense merely because not permitted to convict of the lesser, the natural presumption being that the jury will do its duty and acquit the defendant if not satisfied of defendant's guilt of the higher offense. 8 Cal.Jur. 376, note 10.

12 Cal.App.2d 19

MICEK et al. v. WEAVER-JACKSON CO. et al.

Civ. 10665.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1936.

Rehearing Denied March 9, 1936.

Hearing Denied by Supreme Court April 16, 1936.

1. Master and servant ⇐53
Customer in beauty parlor was invitee to whom was owed duty of exercising ordinary care.

2. Master and servant ⇐53
Corporation operating beauty parlor was not insurer of safety of its invitee.

3. Master and servant ⇐53
Corporation operating beauty parlor was not responsible to customer for latent defects in its equipment which it could not have discovered by ordinary care.

4. Negligence ⇐136(22)
Ordinarily, questions of ordinary care and of negligence of owner of store are facts to be determined by jury under appropriate instructions.

5. Master and servant ⇐66
In beauty parlor customer's action for injuries sustained when swivel chair collapsed, refusal to instruct on subject of latent defects *held* error, in view of evidence that collapse of chair was caused by breakage of steel spindle concealed in metal sheath.

6. Negligence ⇐121(2)
When thing which causes injury is shown to be under defendant's management and accident is such as in ordinary course of things does not happen if those who have management use proper care, happening of accident without positive evidence as to cause thereof establishes prima facie case by raising presumption or inference of negligence on defendant's part.

7. Negligence ⇐121(2)
Where presumption of negligence of defendants arises from happening of accident, defendant assumes burden of advancing evidence, not to satisfactorily account for accident and to show actual cause of injury, but merely to rebut inference that he has failed to use due care.

8. Negligence ⇐121(2)
General rule that burden of proving negligence by defendant rests throughout trial on plaintiff is not affected by res ipsa loquitur doctrine, and presumption which arises in favor of plaintiff where doctrine applies does not cast upon defendant burden in sense that latter is bound to establish freedom from negligence by preponderance of evidence.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

9. Negligence ⇐136(6)

Weight of inference of negligence of defendant arising from happening of accident and defendant's explanation of happening of accident is for jury.

10. Master and servant ⇐66

Res ipsa loquitur doctrine *held* applicable in beauty parlor customer's action for injuries sustained when swivel chair in which she was invited to sit during hair treatment collapsed.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Glen W. Micek and T. S. Micek against the Weaver-Jackson Company and others. From a judgment for the plaintiff, the named defendant appeals.

Reversed and remanded for new trial.

Parker & Stanbury and Vernon W. Hunt, all of Los Angeles, for appellant.

Irving E. Read, of Los Angeles (James E. Minds, of Los Angeles, of counsel), for respondents.

GOULD, Justice pro tem.

Plaintiff Glen W. Micek, a customer in a "beauty parlor" operated by defendant corporation, was injured when a swivel chair in which she was invited to sit for the purpose of receiving a hair treatment collapsed, precipitating her to the floor. Upon a trial by jury, damages were awarded to her and to her husband, also plaintiff herein. Defendant corporation appeals.

Testimony adduced in behalf of plaintiffs offered no hint as to the cause of the collapse of the chair. Defendants' witnesses testified that the chair was of standard make, commonly used for the purpose; that it was one of a large number used in their stores; that the particular chair in question was one of a dozen purchased five years before and continuously used without accident or breakage since the date of purchase; that the equipment of the "beauty parlor" was regularly inspected; that the collapse of the chair involved was due to the breaking of a ¾-inch thick steel spindle, which spindle was concealed in a metal sheath so that the spindle itself would not be observed except by disassembling the chair; and that inspection of the broken part after the accident revealed a clean, fresh break.

Appellant seeks to avoid liability upon the theory that the accident was an unavoidable one, and complains of certain instructions given or refused by the court.

[1-4] The injured customer was an invitee upon the premises of appellant, to whom appellant owed the duty of exercising ordinary care and prudence, Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 197 P. 427, and the latter was not the insurer of the safety of its invitees, Blodgett v. Dyas Co. (Cal.Sup.) 50 P.(2d) 801. Neither was appellant responsible for latent defects in its equipment which it could not have discovered by the exercise of ordinary care, Baddeley v. Shea, 114 Cal. 1, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56; and ordinarily the questions of the exercise of ordinary care and of the negligence of the owner or proprietor of the store are facts to be determined by the jury under appropriate instructions by the court, Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646.

[5] In the case here under consideration the trial court erroneously, we believe, refused to advise the jurors upon the law relating to concealed or latent defects in the chair, and appellant was deprived of its right to have this phase of the case considered by the fact finders. An instruction upon the subject of latent defects refused by the court in the within case is essentially the same as one approved by the Supreme Court in the case of Baddeley v. Shea, supra, as substantially correct.

[6-9] Appellant also objects to the court's instructions given at respondents' request upon the doctrine of res ipsa loquitur. The rule as declared in Shearman and Redfield on Negligence, § 60, was adopted by our Supreme Court in Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 1021, 29 L.R.A. 718, 48 Am.St.Rep. 146, as a correct formulation of the doctrine, in the following language: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." In other words, the happening of the accident itself, without any other evidence on the part of plaintiff, raises a presumption or inference of negligence on the part of defendant, and by virtue of that presumption plaintiff, without any positive evidence as to

the cause of the accident, establishes a prima facie case. To meet this rebuttable presumption, defendant then assumes the burden of advancing evidence, not to satisfactorily account for the accident and to show the actual cause of the injury, but merely to rebut the inference that he had failed to use due care. 45 C.J. 1222. The general rule that the burden of proving negligence on the part of the defendant rests throughout the trial upon plaintiff is not affected by the doctrine of res ipsa loquitur, and the presumption which arises in favor of plaintiff in a case where the doctrine applies does not cast upon defendant the burden of proof in the sense that the latter is bound to establish freedom from negligence by a preponderance of the evidence. Rost v. Roberts, 180 Wis. 207, 192 N.W. 38. The weight of the inference as well as the weight of the explanation is for the determination of the jury.

[10] In the instant case, while plaintiffs in our opinion were entitled to invoke the doctrine of res ipsa loquitur, defendants had the right to rely upon the defense that a latent defect was the sole cause of the accident, and appropriate instructions relative thereto should have been given to the jury.

The judgment is reversed, and the cause remanded for a new trial.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 7

PEOPLE v. GREGORY.

Cr. 1848.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1936.

1. Licenses ⇐18½

Unit certificate acknowledging receipt of money for interest in contract providing for sale of right in chemical for dehydrating and decarbonizing crude oil, and for organization of corporation to take over manufacture and sale of chemical, *held* "security" within Corporate Securities Act, for which permit to sell was required (St.1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Criminal law ⇐657

Conducting of contempt proceedings of defendant's attorney in presence of jury *held* not error, where court fully admonished jury that proceedings should be disregarded, and that they had nothing to do with merits of case, and should not prejudice jury against defendant.

3. Criminal law ⇐713

District attorney's request for stipulation to effect that defendant's signature appeared on certain letter *held* not prejudicial error, where signature was identified as that of defendant, although request for stipulation by district attorney in open court in criminal trial is not proper practice.

4. Licenses ⇐42(3)

In prosecution for violation of Corporate Securities Act, admission of evidence of conspiracy between defendant and codefendant *held* not error, notwithstanding absence of conspiracy charge in indictment (St.1917, p. 673, as amended).

5. Conspiracy ⇐47

Existence of conspiracy need not be proved by direct evidence that parties actually met together and agreed to undertake performance of unlawful act.

6. Licenses ⇐42(4)

Evidence *held* to support conviction of violation of Corporate Securities Act (St. 1917, p. 673, as amended).

7. Criminal law ⇐1119(4)

Assignment of error in argument of district attorney would not be considered on appeal, where transcript failed to set forth any portion of argument on behalf of defendant (Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7).

8. Criminal law ⇐726

Argument of district attorney *held* not misconduct requiring reversal, where statements were made in response to argument made on behalf of defendant.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

W. H. Gregory was convicted of violations of the Corporate Securities Act, and he appeals.

Affirmed.

Ames Peterson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant Gregory and five other persons were charged by indictment with certain violations of the Corporate Securities Act (St. 1917, p. 673, as amended). There were ten counts in the indictment. The first five counts charged grand theft against all defendants except defendant Gregory. The second five counts charged all of the defendants, including defendant Gregory, with violations of the Corporate Securities Act. Defendants Cox and Weatherill were found guilty on all ten counts. Other defendants were found guilty on certain counts and not guilty on others. Defendant, Gregory, was found guilty on all five counts on which he was charged. Defendant, Gregory, alone prosecutes this appeal from the judgment of conviction, the order denying his motion in arrest of judgment, and the order denying his motion for a new trial.

The sixth count of the indictment read as follows:

"And the said James E. Cox, R. K. Weatherill, Jessie M. Gibbs, Henry Steiner, J. E. Soderholm and W. H. Gregory are further accused by the Grand Jury of the County of Alameda by this sixth count of this Indictment of a felony, to-wit, a violation of an Act of the Legislature of the State of California, approved May 18, 1917, Statutes of 1917, page 673 as amended, and known as the Corporate Securities Act, committed on or about the 25th day of November, 1931, in the said County of Alameda, State of California, in the manner following, to-wit:

"That the said James E. Cox, R. K. Weatherill, Jessie M. Gibbs, Henry Steiner, J. E. Soderholm and W. H. Gregory did, on or about the 25th day of November, 1931, in the said County of Alameda, State of California, wilfully, unlawfully and knowingly authorize, direct and aid in the issue and sale of, and did issue, execute and sell, and cause and assist in causing to be issued, executed and sold for value to Gladys E. Jones a security of their own issue, as defined in said Corporate Securities Act, to-wit, a certain unit certificate of interest and participation in a certain contract dated April 15, 1929, between James E. Cox and R. K. Weatherill, without having first applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do.

"And the acts described in the sixth count of this Indictment and the acts described in the first count of this Indictment were part of the same act, transaction and event."

The seventh, eighth, ninth, and tenth counts of the indictment contained similar charges. These were the five counts upon which defendant, Gregory, was tried and convicted.

Upon the trial, the district attorney stated in his opening statement that the prosecution proposed to show "that those offenses charged in the indictment and other similar or related offenses were committed by these defendants and by others who were agents and servants of these defendants in the course of and in furtherance of a general conspiracy, the common unlawful purpose of which was to obtain money from the public by fraudulent and false representations and by an unlawful sale of interests, called unit certificates in a certain alleged contract between the defendant James E. Cox and R. K. Weatherill, which contract pertained to the promotion of an organization ostensibly designed to sell or market a formula or process for the treatment of crude oil, and later by the unlawful sale of stock in the Cox Process Corporation."

The reporter's transcript is a voluminous one consisting of 4,029 pages, but, in view of the fact that defendant Gregory concedes the guilt of the remaining defendants, the statement of facts here may be confined to a brief outline of the general plan under which said defendants operated, followed by a résumé of the testimony relating to defendant Gregory's connection therewith.

In 1929, defendant Cox claimed to have developed a new process for "dehydrating and decarbonizing crude oil." He and defendant Weatherill entered into a written agreement. Said agreement was in the form of a letter signed by defendant James E. Cox and his wife, Lillie E. Cox, which letter was indorsed as accepted by R. K. Weatherill under date of April 15, 1929. It recited the discovery of the process, the ownership of a lease covering an oil shale deposit from which "Cox Chemical" was obtained, and the need of capital. It gave defendant Weatherill the right to

purchase all rights in the "Cox Chemical" and the lease upon certain conditions. Defendant Weatherill was to begin erection of a plant within a specified time, the cost of which plant was not to exceed $150,000. He was to organize a corporation to take over "Cox Chemical," the lease, the plant, and the equipment. One-fourth of the entire capital stock of the corporation was to be issued to defendant Cox and his wife. The remaining provisions are unimportant in this discussion.

Between 1929 and April, 1933, receipts or unit certificates were sold and issued to the general public without any permit from the corporation commissioner. They were written on the letterhead of "R. K. Weatherill, Suite 924 Security Title Insurance Building, Los Angeles," and read as follows:

"Received of ——— Address ——— City of ——— State of ——— Amount ——— Dollars ($———) for and in consideration of an undivided ——— of one per cent interest in that certain contract dated April 15th, 1929, a copy of which is hereto attached and made a part hereof, in which James E. Cox and the undersigned are the parties, said contract referring especially to a certain chemical discovered by the said James E. Cox for use in de-hydrating and de-carbonizing crude oil.

"This receipt is not transferable.

"(Signed) R. K. Weatherill"

The sales were made to the general public in California and elsewhere. In 1933 the Cox Process Corporation was incorporated in Nevada, and a stock transfer office was established in Reno. Letters were sent to all unit certificate holders asking them to surrender their unit certificates for stock and practically all unit holders made such exchange. This continued from April, 1933, to September, 1934, without any permit from the commissioner of corporations. New sales were likewise made. An attempt was made to evade the provisions of the Corporate Securities Act by issuing large blocks of stock to certain defendants and then transferring such stock to the investors.

An extensive sales campaign was conducted throughout the five-year period from 1929 to 1934. The prosecution claimed that these sales exceeded $1,000,000, and defendant Gregory concedes that the evidence showed that said sales exceeded $700,000. During this entire period, the office was located at "Suite 924, Security Title Insurance Building, Los Angeles." This office was the principal place of business from which the correspondence was sent covering the sales campaign. The sales force centered its activities there, and the unit certificates were mailed from that address. The only other office was the one established in Nevada in 1933 for the sole purpose of the issuance of the stock of the Nevada corporation.

The grand theft charges in the indictment were based upon obtaining money under false pretenses during the sales campaign. We need not set forth the numerous false representations made. Defendant Gregory concedes that the evidence showed "that the whole process was conceived in fraud by Cox," and further concedes as to defendant Weatherill that "the perusal of the transcript indicates beyond the peradventure of a doubt that he was guilty of the charges brought against him." For the purposes of this discussion, it is sufficient to state that the evidence conclusively shows that all of the defendants other than defendant Gregory were actively engaged in the sales campaign which involved a gigantic scheme to cheat and defraud the public through the sale, by false representations, of securities representing interests in a wholly worthless process. We find no evidence to show that defendant Gregory personally sold any securities, and it may be assumed that it was for this reason that defendant Gregory was not charged with grand theft, but only with violating the Corporate Securities Act.

We may now proceed to a brief summary of the evidence relating to defendant Gregory. For a number of years prior to his conviction, said defendant lived and practiced law in Los Angeles. He admits that he acted as attorney for defendant Weatherill and that there was a close association between them during the period in question. He further admits that he drew the contract which was attached to the receipt or unit certificate and also the form of the receipt or unit certificate. The evidence shows that in 1929 he and defendant Weatherill went to Hayward to look over the land and to negotiate with defendant Cox. According to defendant Weatherill, defendant Gregory was the one who "drew up the whole set-up" and "handled all the legal affairs" for several

years thereafter. This was not denied by defendant Gregory.

As above stated, the business, which consisted almost entirely of selling these receipts or unit certificates, was handled from the suite at 924 Security Title Insurance building. Donald McKenzie, since deceased, was one of the salesmen, and he personally sold unit certificates amounting to $300,000. He and others worked in and from said office. All orders for unit certificates went through said office. Defendant Gregory occupied this suite with defendant Weatherill and others. The name "Cox Process Company" was on the door. The names of defendant Gregory and others likewise appeared upon the door. Defendant Gregory admits that during at least part of the five-year period in question his office rent was paid by defendant Weatherill and that he received approximately $2,500 in fees from said defendant. The unit certificates were typed in the office above mentioned and were there delivered to purchasers or prepared for mailing. In some instances these unit certificates were backed with blue legal backing paper upon which was printed defendant Gregory's name. There was a common reception room for said suite, and the same stenographer who did the stenographic work in connection with the issuance of the unit certificates also did the work of defendant Gregory. There was also testimony showing that defendant Weatherill had promised defendant Gregory and certain salesmen to give them an interest in the organization. This appears to be admitted in some of defendant Gregory's correspondence.

We will not attempt to set forth the contents of defendant Gregory's correspondence with certain defendants and with certain investors. This correspondence and the other evidence above set forth conclusively show that said defendant's claim that he did not know that the unit certificates were being sold to the public cannot be given weight. Said evidence clearly shows that defendant Gregory prepared and otherwise aided in the issuance of said securities with knowledge that said securities were to be sold to the general public in the state of California and elsewhere. This was all that was required to sustain his conviction on the offenses with which defendant Gregory was charged.

[1] The testimony of the deputy corporation commissioner is also significant. He testified that in June, 1931, stop orders were sent to defendant Gregory and others ordering that the sale of interests in the Cox Chemical Company be discontinued. Defendant Gregory admitted before the grand jury that he had received this notice. The deputy further testified that a week later he had a conference with defendant Gregory in which defendant Gregory acknowledged that unit certificates were being sold to the public, but claimed that the document was not a security and that no permit was necessary. No such claim is now made and we need not discuss the point further than to state that the receipt or unit certificate was clearly a "security" within the meaning of the Corporate Securities Act. The deputy further testified that defendant Gregory then stated that "they had particularly designed this method of handling the situation in order to avoid the regulations or investigation and that that particular receipt form had been designed by him for the purpose of avoiding the necessity of submitting this plan and process and the method of operation to the commissioner of corporation's office." The deputy advised defendant Gregory that the receipt or unit certificate was a security and each sale made without a permit would constitute a violation of the act. However, it does not appear that defendant Gregory or any of the other defendants paid any attention to the stop order or the advice of the deputy commissioner. The sales campaign continued until shortly before the defendants were indicted in 1934.

[2, 3] On this appeal appellant's first assignment of error is "Error in conducting contempt proceedings in the presence of the jury during the testimony of G. O. Peterson and error in connection with proposed stipulation." The contempt proceeding was one in which the trial court found counsel, who was then representing appellant, guilty of contempt for acts committed in open court, and imposed a fine of $50. It is not claimed that the acts of counsel were not contemptuous or that the trial court did any more than declare counsel in contempt and impose the fine. Immediately thereafter and without any request, the trial court fully admonished the jurors that they should entirely disregard the contempt proceeding, that it had noth-

ing to do with the merits of the case, and that they should not be prejudiced against any of the defendants by reason of the proceeding. No authority is cited by appellant to show that it was error under the circumstances to conduct the contempt proceeding in the presence of the jury, and we know of none. In fact, there are numerous authorities to the contrary. People v. Johnson, 219 Cal. 72, 25 P.(2d) 408; People v. Beitzel, 207 Cal. 73, 276 P. 1006; People v. Tinnin, 136 Cal.App. 301, 28 P.(2d) 951; People v. Santos, 134 Cal. App. 736, 26 P.(2d) 522; People v. Frank, 132 Cal.App. 360, 22 P.(2d) 792. We therefore conclude that said claim of error may not be sustained. The second alleged error relates to a request made in open court for a stipulation. The district attorney requested a stipulation to the effect that appellant's signature appeared on a certain letter. The asking for the stipulation was assigned as prejudicial misconduct. Thereafter the signature was identified as that of appellant's and, so far as we can ascertain, there is no evidence to the contrary. While we do not believe it to be proper practice for the prosecution to request stipulations in open court in a trial on a criminal charge, we find nothing prejudicial in the incident to which reference has been made.

[4] It is next claimed that there was "Error in admitting against appellant evidence of an alleged conspiracy." Appellant points out that there was no conspiracy charged in the indictment and that the prosecution was permitted to offer proof of an alleged conspiracy. We find no merit in this point, for the admission of evidence of a conspiracy has been repeatedly sanctioned in this state even in the absence of a charge of conspiracy in the indictment. People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Coffelt, 140 Cal.App. 444, 35 P.(2d) 374; People v. Sampsell, 104 Cal.App. 431, 286 P. 434; People v. Wilson, 76 Cal.App. 688, 245 P. 781; People v. Anderson, 59 Cal.App. 408, 211 P. 254; People v. Murphy, 53 Cal. App. 474, 200 P. 484; People v. Correa, 44 Cal.App. 634, 186 P. 1055; People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Ford, 25 Cal.App. 388, 143 P. 1075.

[5] Appellant's next point, "Error in holding that appellant was ever a member of any conspiracy," is closely related to the discussion which has preceded. Turning back to the indictment, we find that there were five counts of grand theft and five counts violating the Corporate Securities Act. The grand theft charges were based upon obtaining money by false pretenses through the issuance and sale of certain securities to certain persons. The charges of violating the Corporate Securities Act were based upon the issuance and sale of the same securities to the same persons. The testimony as to all counts necessarily covered the issuance and sale of said securities. It may be assumed for the purpose of this discussion that the evidence was insufficient to show that appellant entered into a conspiracy to commit grand theft, but there is no doubt that it was ample to show that he entered into a conspiracy to violate the Corporate Securities Act. Appellant was charged only with such violations and not with grand theft. He was convicted only of such violations, and, as the evidence clearly sustains his conviction, it becomes unnecessary to set forth evidence relating to the conspiracy. It may be stated, however, that the existence of a conspiracy need not be proved by direct evidence that the parties actually met together and agreed to undertake the performance of an unlawful act. People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Correa, 44 Cal. App. 634, 186 P. 1055.

[6] Appellant apparently concedes that the evidence was sufficient to show that he violated the Corporate Securities Act, but he speaks of "the scales hanging evenly in the balance." We cannot agree that the scales were hanging evenly as to the violations of the Corporate Securities Act but, on the other hand, we believe that the record conclusively showed, by admittedly competent evidence, that appellant was guilty of such violations. We therefore will not discuss certain assignments of error in the admission of evidence. We have examined these assignments, and are of the opinion that the error, if any, in admitting the evidence to which reference is made, could not have been prejudicial to appellant.

[7,8] Appellant also claims "Error in the closing argument of the district attorney." In support of this claim, appellant has set forth a substantial portion of said argument. It is entirely apparent therefrom that the district attorney was making certain statements in response to the arguments made on behalf of the defend-

ants. The transcript does not set forth any portion of the arguments on behalf of defendants as required by section 7 of rule II of the Rules of the Supreme Court and District Courts of Appeal. Under these circumstances, this court might well refuse to consider this assignment of error. People v. Lawyer, 1 Cal.App.(2d) 1, 35 P.(2d) 1036; People v. James, 133 Cal. App. 751, 24 P.(2d) 859; People v. Bragdon, 103 Cal.App. 20, 283 P. 881. We have nevertheless examined the closing argument of the district attorney, and, while we cannot place the stamp of approval on all that was said, we are of the opinion that there was nothing therein which would warrant a reversal of the judgment against appellant. We again point out that appellant was charged solely with certain violations of the Corporate Securities Act. These charges were conclusively proved, and we are convinced that none of the alleged errors resulted in a miscarriage of justice.

The judgment and orders appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



12 Cal.App.2d 32

CLARK v. WESTERN FEEDING CO.

Civ. 10588.

District Court of Appeal, Second District, Division 1, California.

Feb. 20, 1936.

Appeal and error ⇐482

Appellate court's temporary stay of execution or alternative writ of supersedeas, restraining stockholder from examining corporation's books and records, must be quashed and discharged where additions to record show that judgment quieting his title to over 10 per cent. of corporation's stock has become final and corporation's brief on its appeal from superior court's order allowing such examination discloses decision against appellant's principal contention as to invalidity of such judgment (Civ.Code, § 357).

Action by Merl R. Clark against the Western Feeding Company. From a judgment for plaintiff and an order allowing him to examine defendant's books and records, defendant appealed, after which defendant was granted a temporary stay of execution or writ of supersedeas.

Temporary stay or alternative writ quashed and discharged.

See, also, 52 P.(2d) 991.

R. D. McLaughlin, of Los Angeles, and Walter L. Jenkins, of Glendora, for appellant.

Laurence B. Martin and Gwartney & Gall, all of Los Angeles, for respondent.

HOUSER, Presiding Justice.

Supersedeas. The essential facts involved herein, in substance, are that in an action that was pending in the superior court, the plaintiff therein, Merl R. Clark, was awarded a judgment against Western Feeding Company, a corporation, et al., by the terms of which the title to 81 shares of stock in the defendant corporation was quieted in the plaintiff, Clark, and from which judgment the defendant, Western Feeding Company, appealed to this court. In the meantime, it appearing that the said 81 shares of stock represented considerably more than 10 per cent. of the issued and outstanding stock of said corporation, Clark instituted a proceeding in the superior court for the purpose of enabling him, as owner of said stock, to examine the books and records of said corporation; and which proceeding resulted in an order being made by the superior court by which that privilege was accorded to him. Thereupon Western Feeding Company appealed from that order, also.

At the instance and request of Western Feeding Company, this court caused a temporary stay of execution or writ of supersedeas to issue, by which, in substance, pending a hearing in this court on the application of Western Feeding Company for a permanent order of supersedeas, Clark was restrained from making any examination of the books and records of said corporation. However, from recent additions to the record herein, it now appears that as to the appeal from the judgment by which the title of Clark was quieted to said 81 shares of stock, that judgment has become final—from which it should follow that, as such owner of the said 81 shares

of stock, in accordance with the provisions of section 357 of the Civil Code, prima facie, at least, Clark is entitled to make the examination of the said books and records which were the subject of the said order.

An inspection of the appellant's opening brief filed in the appeal from the order in question discloses the fact that the principal point relied upon by appellant therein, to wit, the alleged invalidity of the judgment by which Clark was adjudged to be the owner of said stock, having been decided against the contention of appellant, it becomes manifest that said determination is practically decisive of the appeal from the order.

The remaining and subsidiary point in appellant's said brief in the matter of the appeal from the order does not appear to be seriously presented. But in any event, without here attempting to determine said point, from a cursory examination of the record, it may suffice to state that at most, especially considering the record and files in the two appeals, it is not of that force which, even if sustained in principle, would be of sufficient importance to justify a reversal of the order.

In such circumstances, and in consequence of the entire situation as hereinbefore outlined, it is ordered that the temporary stay of execution or alternative writ heretofore issued herein be, and it is, hereby quashed and discharged.

I concur: YORK, J.



11 Cal.App.2d 677

JAMESON PETROLEUM CO. v. STATE et al.

Civ. 10005.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1936.

1. Statutes ⇐225

Rule that statutes in pari materia must be construed together is peculiarly pertinent in construing taxation statutes.

2. Taxation ⇐378(3), 386(1)

Oil and gas leases *held* "real property" for purposes of classification for taxation under Bank and Corporation Franchise Tax Act, in view of same construction given words in similar statute previously enacted for same general purpose (St.1929, p. 19 as amended; Pol.Code, §§ 3617, 3629, 3650, 3820; Const. art. 13, §§ 1, 14 (d), 16).

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Jameson Petroleum Company against the State of California and another. From an adverse judgment, the plaintiff appeals.

Affirmed.

Black, Hammack & McWilliams and Alfred L. Black, Jr., all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

STURTEVANT, Justice.

This is an action to recover taxes which it is alleged were illegally assessed for the year 1931 and paid under protest. The trial court sustained the demurrer of the defendants to the plaintiff's amended complaint. The plaintiff declined to amend and judgment was entered against it. From that judgment, the plaintiff has appealed.

As stated by the plaintiff on the first page of its opening brief, the only issue involved is that of law as to whether or not oil leases and mineral rights are real property when considered in the light of section 16 of article 13 of the Constitution, the Bank and Corporation Franchise Act (Stats.1929, p. 19, as amended), and sections 3617 and 3820 of the Political Code.

Except certain exempted properties (not involved in this action) all property, real, personal, and mixed, and capable of private ownership is taxable. Const. art. 13, § 1. Franchises of every kind and nature are taxable. Section 14, subd. (d). After enumerating certain specific franchises not involved in this litigation, subdivision (d) of section 14 of article 13 of the Constitution provides: "All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for

the benefit of the state." In 1928 section 16 was added to said article. Among other things, it provides: "§ 16. Taxation of banks, franchises, etc. Notwithstanding any other provision of this Constitution: * * * 2. (a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. The amount of such state tax shall be equivalent to four per cent of their net income. Such tax shall be subject to offset, in a manner to be prescribed by law, in the amount of personal property taxes paid by such corporations to the state or political subdivisions thereof, but the offset shall not exceed ninety per cent of such state tax. * * * 3. The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may change by law the rates of tax, or the percentage, amount or nature of offset provided for in paragraphs 1 and 2 hereof." The next Legislature that met after the adoption of section 16 of article 13 of the Constitution enacted the statute known as Bank and Corporation Franchise Tax Act, Statutes 1929, p. 19. Among other things, section 4 thereof (page 20) provides as follows: "Sec. 4. Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2 (a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year.

"Each such corporation shall be entitled to an offset against said franchise tax, in the manner hereinafter provided, in the amount of taxes paid upon its *real* and *personal* property to any county, city and county, city, town, or other political subdivision of the state, but the total offset shall not exceed seventy-five per centum of the said franchise tax, and in no case shall the taxpayer be entitled to offset *more than* ten per centum of its said *real property* taxes." (Italics ours.)

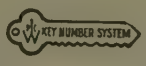
The plaintiff is the owner and holder of certain oil and gas leases. It returned them as personal property. The franchise tax commissioner reclassified them as real property, and directed the plaintiff to pay a tax in accordance with the revised classification. First duly protecting itself by taking the statutory steps as conditions precedent thereto, the plaintiff paid the tax as directed, and thereafter, under section 30 of the act (Stats.1929, pp. 19, 31), commenced this action to recover the amount so paid under protest.

[1, 2] The plaintiff argues that a leasehold interest is personal property and that it has been so held in this state. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 P. 680; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243, and Guy v. Brennen, 60 Cal.App. 452, 213 P. 265; see, also, Dabney v. Edwards (Cal.App.) 43 P.(2d) 848. No one of those cases involved a tax statute. On the other hand, in Ventura County v. Barry, 207 Cal. 189, 277 P. 333, the tax statutes were involved. Moreover, the nature of a tax on a leasehold interest created by certain oil and gas leases was there held to be a tax on real property. The plaintiff calls attention to the fact that in certain places the court used the expressions "real estate," "land," and "real property" as being synonymous. It then argues that such use was inadvertent and erroneous. We think such use was not inadvertent. Title 9, part 3, of the Political Code (section 3607 et seq.) uses those expressions as interchangeable in many places. It is sufficient to note and compare sections 3617, 3629, and 3650. In construing those sections it cannot be said that the court inadvertently used certain words when they were the identical words which it was called upon to construe. In the case last cited, 207 Cal. 189, at page 195, 277 P. 333, 335, the court also quoted with approval as follows: "In the case of People v. Smith, 123 Cal. 70, 55 P. 765, it is said: 'Section 3617 of the Political Code defines the terms used in the assessment of property for the purposes of taxation, and these definitions must control in matters relating to taxation, whether they conform to the definitions used in the law for other purposes or not.' And again, in Western Union Tel. Co. v. Modesto Irr Co., 149 Cal. 662, 87 P. 190, 9 Ann.Cas 1190. it was said: 'Moreover, we think

that, for the purpose of the revenue to the district, the definition of real property and personal property in the general revenue and taxation laws of the state, as found in the Political Code, must prevail.'" Therefore, in determining whether a tax on an oil lease is a tax on real property, this court should follow Ventura County v. Barry, supra, and hold that it is when construing the provisions of the Political Code. It remains for us to consider the meaning of "real property" and "personal property" when used in the Bank and Corporation Franchise Act. That act is solely a tax statute. So is title 9, part 3, of the Political Code. Both statutes are, at least in part, addressed to the acts of the same officers regarding, in part, the same matters. Both were enacted to carry into effect article 13 of the Constitution. It is a fundamental rule of statutory construction that statutes in pari materia must be construed together. Nothing to the contrary appearing on the face thereof, it is clear that the same expressions should be given the same meanings in both statutes. Said rule is peculiarly pertinent in construing taxation statutes. Old Homestead Bakery, Inc., v. Marsh, 75 Cal.App. 247, 258, 259, 242 P. 749. Applying that rule in the instant case, it is clear that "real property" and "real estate" are used as synonymous terms in both statutes.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 753

JAMESON PETROLEUM COMPANY (a Corporation), Plaintiff and Appellant, v. STATE of California (a Body Politic), and Charles G. Johnson, as State Treasurer thereof, Defendants and Respondents.

Civ. 10006.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1936.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Black, Hammack & McWilliams and Alfred L. Black, Jr., all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

STURTEVANT, Justice.

The record in this case is the same as the record in Jameson Petroleum Co., a corporation, v. State of California (Cal. App.) 54 P.(2d) 776, this day filed, except that case involved the legality of the assessment for the year 1931 and the instant case involved the legality of the assessment for the year 1932.

On the authority of the case cited and the reasons therein stated, the judgment in the instant case should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 691

BRYSON v. MANHART et al.

Civ. 10759.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1936.

1. Fraudulent conveyances ⇐299(1)

Evidence *held* insufficient to sustain finding that transfers of property and changes of beneficiary in life policies were not made to defraud creditors.

2. Appeal and error ⇐931(1)

In reviewing findings for defendants, evidence must be viewed in light most favorable to them.

3. Evidence ⇐334(1)

Certificate from registrar of vital statistics constituted evidence of facts therein stated (St.1915, p. 575).

4. Evidence ⇐83(1)

Where public administrator approved claim, presumption existed that it was not presented beyond legal time limit.

5. Executors and administrators ⇐237

Allowance of claim against deceased's estate *held* not subject to attack in action by administrator to recover proceeds of life

policies and set aside alleged fraudulent transfers of property.

6. Fraudulent conveyances ⊜64(1)
Transfers of property while transferor was hopelessly insolvent with intent to defraud creditors *held* void (Civ.Code, § 3439).

7. Fraudulent conveyances ⊜237(1)
Creditors of deceased could recover proceeds of policies on his life paid as result of fraudulent changes of beneficiary by insured while insolvent.

8. Fraudulent conveyances ⊜299(1)
Evidence *held* to establish that deceased while hopelessly insolvent made transfers of property and changes of beneficiary in life policies to defraud creditors (Civ.Code, § 3439; Code Civ.Proc. § 956a).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Frank Bryson, as administrator with the will annexed of the estate of George Channing Lawrence, deceased, against Katharine L. Manhart and another. From an adverse judgment, plaintiff appeals.

Judgment reversed, and cause remanded, with directions.

W. C. Dalzell and Robert R. Stentz, both of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, for respondents.

WOOD, Justice.

By this action the public administrator seeks to recover for the estate of George Channing Lawrence the proceeds of certain insurance policies collected and held by the defendants and to set aside the alleged fraudulent transfers of certain property made by decedent in his lifetime. Judgment was entered in favor of defendants; the trial court having found that there was no intention on the part of the decedent and defendants to hinder, delay, or defraud creditors. This finding is attacked by plaintiff, and a review of the evidence is necessary for a proper understanding of the problem before us.

The transactions involved covered the period from September 15, 1919, to July 4, 1928. At various intervals from the first-mentioned date to November 17, 1926, Lucy W. Whipple, aunt of decedent and a resident of Boston, on behalf of herself and as trustee for her sisters, one of whom was the mother of decedent, intrusted to decedent the sum of $271,489.02 to be invested and reinvested in their behalf. Decedent was a lawyer living in Pasadena during most of the time in which he handled the trust funds. He and defendants, husband and wife, moved to Pasadena or the vicinity of Pasadena in the year 1922. He did not maintain an office or engage in the practice of law, and, so far as can be learned from the record, he did not engage in any gainful occupation. He did, however, hold in his name several pieces of real estate of comparatively small value, and over a period of years bought and sold securities on the stock exchange. The total purchases in this line of activity amounted to approximately $391,000, and his sales amounted to approximately $383,000. Including commodity purchases, his total losses were approximately $35,000. No accounting was ever made between Lucy W. Whipple and decedent. She presented a claim to the public administrator based upon the trust fund she had delivered to him. This claim was approved by the public administrator and the court in the sum of $196,489.02. Other debts were left by decedent amounting to approximately $25,000.

Before Mrs. Whipple intrusted funds to decedent, he carried but one insurance policy, the value of which was only $4,000. While decedent was handling his aunt's funds, he increased the amount of his insurance to approximately $200,000. Except in the case of one policy for a short period, which is of no consequence in this discussion, the wife of decedent, Violet Lawrence, was named beneficiary in the thirteen policies which he carried. Violet Lawrence died February 18, 1928. Thereupon the estate of George Channing Lawrence became beneficiary. On March 16, 1928, or shortly thereafter, at the request of decedent, defendant, Katharine L. Manhart, his sister, was made beneficiary in each of the policies. George Channing Lawrence committed suicide on July 4, 1928. During the period in which decedent received funds from his aunt, he had no difficulty in paying insurance premiums, but thereafter his financial troubles began. In December, 1926, he borrowed on two policies and borrowed $5,000 from each of two friends. During the following year, he borrowed on several policies and allowed others to lapse. During his wife's illness in February, 1928, he

was unable to pay for nurses and expenses immediately following her death. Between March 1, 1928, and March 16, 1928, he renewed his activities on the stock market and lost $2,512.50. Between March 16, 1928, and April 5, 1928, decedent, in addition to making Katharine L. Manhart beneficiary in all of his insurance policies, delivered to her a bill of sale of all his personal property, deeded to her all of his real property except three cemetery lots, and delivered to her his will in which she was named sole legatee and made executrix without bond. At this time some of the policies had a small cash surrender value. About April 10, 1928, decedent borrowed an automobile from a dealer friend saying he could not pay for it, and on May 8th sent the friend a note to pay for the car, inclosing a letter saying: "If I should not be on hand at its maturity * * * Katharine L. Manhart, 941 South Norton Street, Los Angeles will take care of it when due." Later in May, 1928, he borrowed $1,500 from the same friend. Between June 1 and June 20, 1928, he obtained $1,850 by cashing checks drawn by his mother-in-law at his request, although she did not owe him anything. Between June 20 and July 4, 1928, he cashed checks of the value of about $1,800 drawn on a Boston bank, which were dishonored by the bank. At the time of the death of Violet Lawrence, defendant Katharine L. Manhart was aware of decedent's impoverished condition. She assisted him in making the funeral arrangements. She herself loaned him $5,000 before the death of his wife, which had not been repaid.

Between July 14 and August 8, 1928, defendants received from the insurance companies the total amounts due on the policies, the sum of $191,801.55, and deposited it in five different banks in Los Angeles under fictitious names. It is claimed by defendants that the money was placed under the control of defendant Clair King Manhart as custodian only for the use and benefit of his wife. Shortly thereafter defendants paid the amounts due the friends of decedent who had loaned him money and made good the worthless checks. Defendant Clair King Manhart then went East and settled all claims against decedent except that of Lucy W. Whipple, paying out a sum total in excess of $25,000.

Defendant Katharine L. Manhart was appointed administratrix with the will annexed of the estate of Violet Lawrence. Upon closing the estate, there was distributed to the estate of George Channing Lawrence the sum of $5.91. Katharine L. Manhart was appointed executrix of the will of George Channing Lawrence in November, 1928. She published notice to creditors, but nothing more was done in the administration until a petition for her removal was filed on June 6, 1929. She filed an inventory on June 27, 1929, showing that the assets of the estate were: A post mortem dividend on insurance of $181.08; note for $5,000 payable to decedent's mother-in-law indorsed in blank, dated March 20, 1928, due September 20, 1928, marked in the inventory "doubtful value"; loans of $1,100 not evidenced by any writing; and the inheritance of the estate of Violet Lawrence. Katharine L. Manhart was removed from her office as executrix and the public administrator appointed in her stead.

The trial court did not determine the value of the assets of the decedent at the time of the transfers complained of or at the time of the changes of beneficiary. The evidence of the value of the assets is contained in the testimony of defendants. Among the items claimed by them as assets is a strange "fee" asserted as due from Lucy W. Whipple for handling her affairs in the sum of $70,000. Giving all the claimed assets their highest possible value, including the "fee" of $70,000, and taking several doubtful debts due decedent at their face value, the sum total of the decedent's estate was far less than sufficient to pay the single claim of Lucy W. Whipple.

[1, 2] A review of the evidence leads unerringly to the conclusion that at the time of the transfers of property and changes of beneficiary the decedent was hopelessly insolvent and that the trial court's findings that the transfers and changes of beneficiary were not made to defraud creditors are not supported by the evidence. This conclusion must be reached upon a consideration of the evidence in a light most favorable to defendants.

Among the findings appears the following: "The court also finds there were certain other assets of George Channing Lawrence, deceased, which were transferred to defendant Katharine L. Manhart, but during the course of trial, plaintiff herein abandoned all right he might have in and

to the assets." We find nothing in the record to justify this finding. Plaintiff is entitled to pursue the property fraudulently transferred and to force an accounting thereof from defendants.

[3] The findings are silent on the question whether decedent died by his own hand, and defendants now contend that it was not established that decedent took his own life. Many circumstances were shown in evidence indicating suicide. A certificate from the registrar of vital statistics was presented certifying to the coroner's certificate of death in which the cause of death is given as follows: "Gun shot wound of brain, suicidal." The certificate was evidence of the facts therein stated. Stats.1915, p. 575; In re Estate of Lenci, 106 Cal.App. 171, 288 P. 841; Robinson v. Western States Gas & Electric Co., 184 Cal. 401, 194 P. 39. No contrary showing was made.

[4, 5] Defendants contend that the claim of Lucy W. Whipple was not filed within the time allowed by law, and therefore it should not have been received in evidence. An unverified claim was presented well within the legal time, and thereafter a verified amended claim was filed bearing the indorsement that it had been approved by the public administrator. The date of its presentation to the public administrator was not shown. The Code required the claimant either to file her claim with the clerk or to present it to the administrator. After its approval by the public administrator, the claim was approved by the court. It will not now be presumed that it was presented to the public administrator beyond the legal time limit. Moreover, the allowance of the claim is not subject to attack in this action.

[6] In view of the facts as set forth above, it is clear that the transfers of the real estate and personal property are void. The transactions are covered by section 3439 of the Civil Code: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

[7] The contention of plaintiff that creditors may recover proceeds of insurance policies paid as the result of fraudulent changes of beneficiary by the insured while insolvent must be upheld. Counsel have not called to our attention any California case involving a fraudulent change of beneficiary under circumstances similar to those of our case. The rule sought to be applied has been sustained in a number of other jurisdictions. In Pope v. Carter, 210 Ala. 533, 98 So. 726, 727 the court said: "Life insurance, taken out, and premiums paid by the insured, and payable to his estate, is property subject to the payment of his debts. A voluntary conveyance or transfer of such policies of insurance is constructively fraudulent and void, as against the existing creditors of the insured. Proceeds of policies so carried by the husband, payable to his estate, and transferred to his wife by a change of the beneficiary named in the policies made after the husband has become insolvent, without valuable consideration, are subject to the claims of the husband's creditors existing at the time of such transfer. Such transaction is subject to all the rules governing fraudulent conveyances." In Continental Nat. Bank v. Moore et al., 83 App.Div. 419, 82 N.Y.S. 302, 305, the insured was a bank teller who while insolvent was arrested for embezzlement. His insurance had been payable to his estate. A creditor obtained judgment setting aside the assignment of the insurance policy to his wife and directing payment of the proceeds to the creditors. In affirming the judgment, the court said: "Pending the examination of the criminal charges against him, he ordered the change of beneficiaries and took his own life. These events occurred in such rapid succession that in the absence of any other explanation they fairly justify the inference that the decedent, contemplating the act which he shortly thereafter committed, knew that if the policies remained payable to his estate the insurance would go to his creditors, and for the purpose of averting that, and leaving them without redress, he directed the change of beneficiary."

In Navassa Guano Co. v. Cockfield (C.C.A.) 253 F. 883, 885, 6 A.L.R. 1168, the insured held a policy payable at his death to his legal representative, with no surrender value. Being informed that he would soon die, he substituted his brother as beneficiary. In holding the transaction fraudulent as to creditors, the court said: "The insured knew that he was about to die; he had been told so by his brother.

He therefore knew, or at least supposed, that presently, and long before another premium would be payable, the full amount of his policy, less the small note secured thereby, would come into the hands of his executors and be subject to the claims of creditors. The only reasonable inference is that in these circumstances he undertook to turn over to his brother, to whom it was a pure donation, the insurance money which otherwise would go to the payment of his debts. This being so, we think it cannot be said that the transferred policy was valueless. On the contrary, as it seems to us, the fact of impending death, the practical certainty that the life of the insured would end within a few days, operated to remove the element of contingency, and gave to the policy at the time of its transfer an actual pecuniary value closely approximating its face amount. The terms of the policy relating to surrender value may be controlling, when the insured entertains the ordinary expectation of life; but they should not be permitted to shield a gratuitous transfer to the prejudice of creditors, when he knows that death is an early certainty. Nor can the transfer in question be defended on the ground of difference between conscious and constructive fraud, for it is familiar doctrine that every man must be presumed to intend the natural consequences of his acts. The insurance procured by Cockfield was by his direction made payable to his legal representatives, and it thereby became, whatever its value, an asset of his estate. When he sought to change the beneficiary, he knew that death was near, and that the proceeds of the policy, if not transferred, would soon be paid to his executors; and he was therefore chargeable with the results of his action, even if he lacked the intention of defrauding his creditors. In short, we are convinced that the transaction under review was fraudulent as to creditors and must be so adjudged." See, also, Gould v. Fleitmann, 230 N.Y. 569, 130 N.E. 897; Bailey v. Wood et al., 202 Mass. 562, 89 N.E. 149; Iden v. Huber et al., 259 Mich. 3, 242 N.W. 818; Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N.W. 159; In re McKown's Estate, 198 Pa. 96, 47 A. 1111.

Defendants have cited the case of North British, etc., Ins. Co. v. Ingalls, 109 Cal. App. 147, 292 P. 678. That case, however, does not aid the solution of our problem, since a change of beneficiary was not involved and the trial court found, the appeal being upon the judgment roll, that the insured was not insolvent at the time of his death.

[8] By the provisions of section 956a of the Code of Civil Procedure, the reviewing court may in proper cases make findings contrary to those made by the trial court based on evidence adduced before the trial court. Under any reasonable view of the evidence, the allegations of the complaint must be upheld. This court therefore finds all of the allegations of the complaint to be true.

The judgment is reversed, and the cause remanded to the superior court, with directions to enter judgment vacating and setting aside the transfers and assignments referred to in the complaint and to grant plaintiff relief in accordance with the prayer of the complaint.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



ALES v. RYAN. *

Civ. 9475.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1936.

Hearing Granted by Supreme Court April 13, 1936.

1. Physicians and surgeons ⇐18(10)

In action for malpractice, instruction that fact that a sponge was found in patient's abdomen would not support verdict against physician, and that it must be shown that sponge was left in abdomen due to physician's failure to exercise ordinary care *held* proper as against contention that the fact that sponge was found in abdomen constituted negligence per se.

2. Physicians and surgeons ⇐18(10)

In action for malpractice where contention was that surgeon left sponge in abdomen of patient, instruction that plaintiff had burden of proof and that fact the sponge was found in patient's abdomen raised no presumption that it was left there by negligence of the surgeon *held* proper, whether doctrine of res ipsa loquitur applied or not.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 409.

3. Trial ⇐260(8)

Refusal of instruction that surgeon though he acted gratuitously was bound to exercise ordinary care and skill *held* not error where subject-matter was fully covered by another correct instruction.

4. Physicians and surgeons ⇐16

Surgeon who, at request of medical director, performed operation at county hospital and was assisted by an interne and nurses who were employed and paid by hospital *held* not liable on doctrine of respondeat superior for negligent acts of interne or nurses, since relation of master and servant did not exist between surgeon and hospital employees.

5. Trial ⇐251(8)

Refusing instruction that leaving of sponge in patient's body by another surgeon is no defense to malpractice action where defendant surgeon performs operation at hospital and assistant surgeon acts under his direction *held* not error; defense being that defendant used ordinary care, and not that some other surgeon left sponge in abdomen.

6. Physicians and surgeons ⇐18(10)

In action for leaving sponge in patient's abdomen, surgeon *held* entitled to present defense, supported by expert evidence, as to proper medical practice, and hence instructions concerning necessity and effect of expert testimony delineating what is and what is not proper practice in performing similar operations were applicable.

7. Physicians and surgeons ⇐18(10)

Giving instruction limiting recovery to sole allegation of negligence in leaving sponge in patient's abdomen, and declaring absence of any claim that surgeon was unskilled or used improper kind of sponge, *held* not error, in absence of any contention that plaintiff was deprived of asserted right to show any act tending to prove negligence, pleaded in general terms.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Frank Ales, as administrator of the estate of Rose Carauddo, deceased, against Fred S. Ryan. From a judgment for defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 47 P.(2d) 771.

R. V. Bressani, David M. Burnett, and John M. Burnett, all of San Jose, for appellant.

Bohnett, Hill & Campbell, Frank V. Campbell, L. H. Schellbach, and D. T. Jenkins, all of San Jose, for respondent.

STURTEVANT, Justice.

As administrator of the estate of Rose Carauddo, the plaintiff has appealed from a judgment in favor of the defendant in an action brought to recover damages for alleged malpractice which the plaintiff claimed caused the death of his decedent. The points presented involve the soundness of certain instructions. Any facts necessary to a complete understanding of the record will be stated as the occasion may require.

[1] The trial court, at the request of the defendant, instructed the jury as follows: "The mere fact that a sponge was found in the abdomen of the deceased will not support a verdict against the defendant Fred S. Ryan in this case, for, in order for plaintiff to recover against Fred S. Ryan, it must be established that a sponge was left in her abdomen due to the failure of defendant Fred S. Ryan to exercise ordinary care." The plaintiff contends that the alleged negligence in the instant case was negligence per se and therefore that the above instruction was an erroneous statement of the law. He cites and relies on McCormick v. Jones, 152 Wash. 508, 278 P. 181, 65 A.L.R. 1019; Moore v. Ivey (Tex.Civ.App.) 264 S.W. 283; Saucier v. Ross, 112 Miss. 306, 73 So. 49; Harris v. Fall (C.C.A.) 177 F. 79, 27 L.R.A.(N.S.) 1174; 21 R.C.L. 388. The defendant distinguishes each of those cases on the facts that were before the court. We cannot say he does not satisfactorily do so. But conceding, solely for the purposes of this case, that the cases cited by the plaintiff support his contention, it must also be conceded that there are well-considered cases holding otherwise. In Cassingham v. Berry, 150 P. 139, the Supreme Court of Oklahoma was considering a case in which an instruction of the same import was given by the trial court. The plaintiff in that case made the same contention which this plaintiff now makes. In Cassingham v. Berry, 150 P. 139, on page 141, the court said: "The basis and gist of this action was not the result of the operation, but negligence in the performance of it. If there was no negligence in the performance of the operation, then there was no cause of action, and could be no recovery; if there

was negligence in the performance of the operation, then a recovery could be had. Whether or not the defendant exercised that degree of care in performing the operation that the law imposed upon him was the paramount question, and the test of the rights of the parties. And we think the defendant was entitled to this instruction, and, when taken in connection with the other instructions, that it did not prejudice the rights of the plaintiffs." To the same effect see Rayburn v. Day, 126 Or. 135, 268 P. 1002, 59 A.L.R. 1062; Roark v. Peters, 162 La. 111, 110 So. 106; Guell v. Tenney, 262 Mass. 54, 159 N.E. 451; Jackson v. Hansard, 45 Wyo. 201, 17 P.(2d) 659. The last case cited was decided by the Supreme Court of Wyoming in 1933. It is a careful review of the authorities down to date. Having made that review, 45 Wyo. 201, 17 P.(2d) 659, on page 664, the court said: "And we think that under the evidence in this case as outlined above, the question of due care was not a question of law, but was one for the jury to decide, subject, of course, to the ordinary right of the trial judge in such cases." The weight of authority is to the same effect. Note 65 A.L.R. 1028. The trial court did not err in giving the instruction complained of.

[2] Upon the request of the defendant the trial court instructed the jury as follows: "The burden is upon the plaintiff to prove negligence on the part of defendant Fred S. Ryan, and it must be proved by a preponderance of the evidence. The law presumes that defendant Fred S. Ryan was free from negligence and the mere fact that a sponge was left in the abdomen of Rose Carauddo raises no presumption that it was left there by defendant Fred S. Ryan, or that it was left there by reason of his negligence. And if it is just as probable that said sponge was left there by the negligence of another, or by reason of the mistake in the sponge count, or even by Fred S. Ryan under circumstances which would not amount to negligence on his part, then your verdict must be in favor of defendant Fred S. Ryan." Having quoted that instruction, the plaintiff contends that it was error because the doctrine of res ipsa loquitur applied to the instant case. But the instruction complained of was not addressed to the application of that doctrine. That subject was clearly and fully presented by instruction No. 15. The instruction complained of was but a statement of certain statutory rules which obtain whether the case is one in which the doctrine of res ipsa loquitur is, or is not, applicable. The plaintiff confuses the burden of proof with the burden of going forward with the proof. 45 C.J. 1219; 10 Cal.Jur. 783; Bonneau v. North Shore R. R. Co., 152 Cal. 406, 412, 93 P. 106, 125 Am.St.Rep. 68.

[3] It is next contended that the trial court erred because it refused to give an instruction to the effect that the defendant, even though he acted gratuitously, was bound to exercise ordinary care and skill. Whether the instruction was correct or incorrect, the subject-matter was fully covered by an instruction that was given and which was as follows: "The fact that a physician or surgeon renders his services gratuitously does not absolve him from the duty to use reasonable and ordinary care, skill and diligence."

[4, 5] The alleged act of malpractice complained of occurred while performing an operation at the county hospital of Santa Clara county, which is located in San Jose. The record does not disclose that defendant had any authority at the hospital except as stated in this opinion. Dr. D. R. Wilson, the medical director of the county hospital, has general charge of operations to be performed at the hospital and designates the individual who is to perform the operation. He diagnosed the decedent's case, recommended the operation, and summoned Dr. Ryan to perform it. Dr. Ayers, an interne of the hospital, was present and assisted. All nurses in attendance were employed by the hospital and not by Dr. Ryan. The operation performed by Dr. Ryan consisted in removing stones from the gall bladder. The decedent was very corpulent. An incision about eight inches in length was made in the abdominal cavity. In the course of the operation many sponges were used—forty or more. At times certain acts were performed by the defendant, at other times certain other acts were performed by Dr. Ayers, at other times certain acts were performed by the nurses who were present and assisting. Acting on the defendant's request, the trial court gave an instruction which, among other things, contained a passage as follows: "if it is just as probable that said sponge was left there by the negligence of another * * * then your verdict must be in favor of defendant Fred S. Ryan." It also gave an instruction as follows: "If you find from the evidence that none of the nurses or

attendants or doctors or assistants present at the operation of the deceased were in the pay or employ of defendant, Fred S. Ryan, then any negligence, if any, committed by any of said nurses, attendants, doctors, or assistants cannot be charged to Dr. Fred S. Ryan unless you find that he directed the act complained of or that he knew of the existence of such negligent conduct and had a chance to remedy the fault, but failed to do so." But the trial court declined to give an instruction requested by the plaintiff which was worded as follows: "You are instructed that where a surgeon performs an operation at a hospital and an assistant surgeon acts under his direction, it is no defense to an action for negligently leaving a sponge in the patient's body that it may have been left by another surgeon." Asserting that the relation of respondeat superior existed between Dr. Ryan and the others in the room at the time the operation was performed, the plaintiff contends that the trial court erred in giving the first two instructions just mentioned and refusing the other. With this contention we do not agree. It cannot be said that the relation of master and servant existed between Dr. Ryan and any other person present in the room. There is no evidence that would justify the application of the doctrine of qui facit per alium facit per se. Guell v. Tenney, 262 Mass. 54, 159 N.E. 451; Blackburn v. Baker, 227 App.Div. 588, 237 N.Y.S. 611, 613; Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218.

In refusing to give the instruction herein last above set forth, we think the trial court did not err. In his defense it was nowhere claimed by Dr. Ryan that some other surgeon left the sponge in the abdominal cavity of the patient. It was his defense that whether he left it there, or did not, nevertheless he used ordinary care. In that connection he testified that, being about to close the wound, he made a careful search for all of the sponges and that then he asked the sponge nurse for her count. She replied that all were accounted for. He then closed the incision and was dismissed from the case. Assuming that the sponge nurse negligently kept the sponge count and negligently made the wrong reply, under the facts which we have stated we think it is clear that the defendant was not liable for the negligent acts of the sponge nurse and that the instructions given were not erroneous.

[6] The trial court gave several instructions as to the necessity and effect of the testimony of expert witnesses delineating what is and what is not the proper practice in performing such operations as here involved. The plaintiff quotes from Barham v. Widing, 210 Cal. 206, at page 214, 291 P. 173, 176, as follows: "This rule [that scientific knowledge must be proved by scientists], however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert." And then he claims that the instant case presents "facts which may be ascertained by the ordinary use of the senses of a nonexpert." Then he argues that in the instant case said instructions were inapplicable. Before proceeding it should be stated that in presenting his case in chief the plaintiff relied on the doctrine of res ipsa loquitur and did not introduce the evidence of medical men on the subject of what was proper medical practice. In presenting his case the defendant called and examined several expert witnesses. The plaintiff did not in the trial court object to the evidence of any one of those witnesses, but each expert was examined and cross-examined at length. We do not understand the plaintiff to contend that any one of the instructions mentioned in this paragraph was incorrectly framed if in this case the testimony of experts was admissible. However, the objection now made is not a claim that the court erred in stating a single proposition of law; but it is, in effect, an attack on evidence that was never, prior to this time, objected to. Assuming, solely for the purposes of this decision, that the plaintiff may at this time and in this form attack the proceedings in the trial court, we pass to a consideration of the question whether the instructions were applicable in the instant case. In following and applying the rule quoted from Barham v. Widing, supra, many cases are, and will be, difficult of solution. However, in a "sponge case" we think the courts do not differ. Of course, no two cases are identical in their facts. In some of them, as they were presented on appeal, no question of proper practice was involved. The answer was, in effect, "I didn't do it." Laughlin v. Christensen (C.C.A.) 1 F.(2d) 215. In Armstrong v. Wallace (Cal.App.) 47 P.(2d) 740, the defendant wholly failed to meet the inference of negligence which

was cast on him by applying the doctrine of res ipsa loquitur. In Funk v. Bonham, 204 Ind. 170, 183 N.E. 312, the evidence was conflicting and the jury returned a verdict in favor of the plaintiff. But counsel have not cited, and we have not found, a case in which it was held as a matter of law that under a set of facts such as appear in the instant case it was error to give the instructions under attack. In Cassingham v. Berry (Okl.Sup.) 150 P. 139, 141, counsel for the plaintiff, in attacking an instruction given in a parallel case, stated their objection as follows: "The inherent vice in this instruction is the mistake the court made in assuming and inferring as a matter of fact that the defendant could leave the sponges in the abdominal cavity in the exercise of ordinary care. * * * Common sense dictates that leaving the sponges in the abdominal cavity is absolutely and totally inconsistent with the exercise of ordinary care." In disposing of that attack, 150 P. 139, on page 141 the Supreme Court of Oklahoma said: "The doctrine advanced, in this position of the plaintiff, is too exacting for human affairs. It is tantamount to saying that if ordinary care had been used, no mistake could have occurred. It assumes that the exercise of ordinary care would have rendered a human being infallible. And it is a matter of common knowledge, based upon everyday experience, that even in the exercise of the utmost care, all men do make mistakes." In the instant case expert evidence was introduced by this defendant as to what was proper practice in the locality where the operation was performed. The defendant personally testified that he carefully followed that practice in every respect. He was corroborated, but not contradicted by anyone. He was entitled to present that defense. In other words, each case must be tried and determined on its own facts. No set rule obtains merely because it is a "sponge case."

[7] Acting upon the request of the defendant the trial court instructed the jury as follows: "The plaintiff in this action is limited to the allegation of negligence which he makes in his complaint. He can recover on no other ground. The only charge is that the defendants negligently left a sponge in the abdomen of Rose Carauddo. There is no claim that defendants were unskilled or that they negligently used any improper kind or type of sponge, or that an improper or a negligent kind of sponge was used, or of using an improper sponge, or one not provided with rings or hemostats." The plaintiff calls attention to the fact that he had pleaded his cause of action in general terms and therefore that he was entitled to show any act tending to prove such negligence. The first answer is, he makes no claim that he was deprived of such right. During the trial it was the theory of the plaintiff that in the performance of such an operation the only proper practice was to use a sponge provided with rings or hemostats; that the defendant did not use that kind of sponges; and that therefore he was negligent. On the other hand, it was the theory of the defendant that the proper practice was for the person performing the operation to use due care in inserting the sponges and use due care in taking them out, and also that the nurses in attendance should be required to keep a proper count of the sponges and report that count before the incision was closed. In the light of those issues, we see no error in the instruction complained of.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



11 Cal.App.2d 712

GRAND CENTRAL PUBLIC MARKET, Inc., v. KOJIMA.

Civ. 9891.

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1936.

Hearing Denied by Supreme Court April 13, 1936.

1. Landlord and tenant ⇐230(1)

Lessor's complaint seeking delinquent rentals and other charges, and not mentioning certain three-day notices to pay rent or quit, nor requesting forfeiture of leases or removal of lessee, *held* not to warrant judgment of forfeiture or removal.

2. Landlord and tenant ⇐223(2)

Where leases provided that consideration therefor was lessee's covenants, plus certain cash payments to be credited on final months' rent, or to be returned if lessor failed to restore premises after fire, unless lessee was in default, court properly found that such

payments constituted consideration and not security for leases, precluding set-off against claim for rentals and other charges.

3. Landlord and tenant ⇐184(2)

Title to money paid as consideration for lease passes to lessor when lease is executed, and belongs to lessor, even though lessor agrees to give credit for certain final months of term.

4. Landlord and tenant ⇐94(1)

Notice to pay rent or quit does not automatically terminate lease; lease being terminated only if notice is acted upon.

5. Landlord and tenant ⇐94(1)

Lease is forfeited by agreement if lessee quits premises within period specified in notice to pay rent or quit.

6. Landlord and tenant ⇐112(3)

Lessor claiming or collecting rents in legal proceeding, or otherwise, waives existing right to effect termination of lease, notwithstanding prior service of notice to pay rent or quit.

7. Landlord and tenant ⇐94(1)

Letter from lessor's counsel referring to prior notice to pay rent or quit, and announcing intention of commencing suit to remove lessee unless lessee immediately took care of back rent, *held* not to reiterate or extend prior notices to pay rent or quit, and parties' rights were governed by precise terms of such notices (Code Civ.Proc. § 1161, subd. 2).

8. Landlord and tenant ⇐94(1)

Notice to pay rent or quit being intended to lay foundation for forfeiture, terms of notice should be strictly construed.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Grand Central Public Market, Incorporated, against J. I. Kojima. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 52 P.(2d) 988.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for appellant.

Walter S. Coen, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondent.

HOUSER, Presiding Judge.

At this time, a decision by this court in the instant case arises from the fact that, following a former decision therein, a motion to vacate the judgment that theretofore had been rendered, and a petition for rehearing of the appeal, were granted. The sole and only reason for the granting of such motion and such petition was that the opinion theretofore rendered by this court was prepared and written by Judge Lester Wm. Roth, who was then, and still is, sitting as a justice pro tempore of this court, and who, in the course of proceedings had in the lower court, had ruled on various motions, etc., in the cause, and therefore was disqualified from participating in a decision on an appeal from the judgment. As a matter of fact, as to all but one of the several motions to which attention was directed by the moving party in this court, they were decided in his favor; hence as to them, he had no real cause for complaint. But since as to the remaining question in the lower court, the ruling by Judge Roth was against the contention of the moving party in this court, and since the same question was involved in the appeal, it was deemed advisable, if not necessary, that the judgment rendered by this court be vacated and a rehearing granted. However, at the outset, it should be stated that at the time the case was submitted in this court Judge Roth was on the bench, and counsel on either side did not call attention to the fact that he had ruled on some questions in the case in the lower court; and that an examination of rulings on preliminary motions set forth in the clerk's transcript were unnecessary to a decision of the questions on appeal; and further, that the several matters in which Judge Roth participated in the lower court occurred nearly three years prior to the date on which the judgment was rendered herein on appeal; that all such rulings that were made by him were in the regular course in his handling of a very busy department of the lower court; and that such rulings were not of that importance that they created any particular impression upon his mind; as a natural result of which, at the time he prepared the opinion for this court, he had no recollection of the fact that theretofore he had acted judicially in the lower court in any manner as to any question that theretofore had been raised by either of the parties to the litigation.

With so much in explanation, after careful reconsideration of the questions

presented on the appeal by the members of this court, it is concluded that in each and every respect the opinion formerly prepared and written by Judge Roth accurately expresses the views of this court with reference to the issues treated in said opinion, and said opinion is now approved and adopted as the opinion of this court. It is as follows:

Plaintiff and respondent filed a complaint setting forth several causes of action for the recovery of rental in arrears and other charges delinquent and unpaid, pursuant to the terms of three several written leases, executed by it with the defendant and appellant on certain stalls in the Grand Central Market in Los Angeles. The complaint was filed on January 6, 1933, and included a demand for rental for the month of January, 1933. Prior to the filing of the complaint, plaintiff on two occasions in the month of December, 1932, separated by an interval of two weeks' time, served upon defendant two several three-day notices to pay rent or quit; said notices affecting all of said leases and the premises therein demised. Defendant ignored each of said notices and did not pay the rent, nor did he quit the premises. On January 4, 1933, which date was subsequent to the expiration of the second of the three days' notice, plaintiff through its counsel wrote a letter to defendant substantially as follows, to-wit:

"Some time ago you were served with notice either to pay rent or vacate the stalls now occupied by you in Grand Central Market.

"The Public Market feels that as you have been a tenant for such a length of time, they dislike very much to bring suit to remove you from these premises. However, unless you immediately take care of the back rent, I shall commence suit to remove you from these premises."

[1] On January 7, 1933, one day after the filing of plaintiff's complaint, defendant quit the premises demised in the several leases. Plaintiff in its complaint, as already suggested, says nothing about the notices to quit or the letter of January 4th. It pleads the several leases executed, the entry thereunder by defendant, the fact that certain rentals and other charges under the lease have not been paid, and requests judgment for the full delinquent amount. The complaint does not ask for a forfeiture of the leases, or any of them, or that defendant be removed from the premises, and under the allegations of the complaint no forfeiture could be legally decreed, nor could defendant be removed. Defendant in his answer sets forth as exhibits the two several three-day notices and the letter, which has been referred to, and avers that he quit the premises pursuant thereto, and that as a consequence thereof the several leases were forfeited or terminated pursuant to the terms of said notices and said letter. Defendant admits that plaintiff is entitled to rental in arrears, but asserts that plaintiff should not have had judgment for rental for the month of January, as provided for by the lease, since the lease was terminated when he quit the premises on January 7, 1933.

One of the leases in question provided, among other things, as follows:

"* * * in consideration of the covenants and agreements of the Lessee hereinafter set forth, and the sum of Six Hundred Dollars—Dollars ($600.00) now paid to the Lessor by the Lessee, the receipt whereof is hereby acknowledged, said Lessor does hereby lease and demise unto the Lessee, * * *.

"The cash payment now made of Six Hundred Dollars ($600.00), shall, in the event of the full and faithful performance of this contract by the said Lessee, be credited in payment of the rent for the last Two (2) months of the said term; otherwise the said payment this day made shall belong to the Lessor as a part of the consideration to it for the execution of this lease. * * *"

Other paragraphs of the same lease provided that if the lessee shall go into voluntary liquidation and become bankrupt or have receiver appointed, that lessee or his successors would not be entitled to the return of any money theretofore paid to the lessor; and that in the event of the destruction of the premises by fire, and the failure on the part of lessor to restore the same, that the cash payment of $600 made would be returned to lessee, on the condition that the lessee were not then in default under the terms of the lease. The other two leases had identical provisions, except that in the second lease the amount of consideration was $2,000, and in the third, $400. Under the three leases a total consideration of $3,000 was thus paid for the execution thereof.

[2, 3] Defendant, with reference to these payments, contends that they were made by way of security, and that, since

the lease was terminated by plaintiff, he is entitled to an offset of $3,000 against plaintiff's judgment. The court found in appropriate language that the $3,000 paid for the respective leases was by way of consideration for their execution, and not as security for the performance of their terms by defendant. The finding is amply supported by the written terms of the lease itself and by oral evidence on the same subject, which seems to have been given without objection. We are satisfied that the finding and conclusion of the court is correct and is amply sustained by authority. There is no doubt that money paid as consideration to the lessor for the execution of the lease belongs to the lessor. The fact that the lessor may agree to give the lessee credit for certain final months of the lease, if the lessee observes the covenants thereof, does not change the situation. Title to the money passes to the lessor when the lease is executed. Ramish v. Workman, 33 Cal.App. 19, 21, 22, 164 P. 26; Curtis v. Arnold, 43 Cal.App. 97, 103, 184 P. 510; Anderson v. Julius Levin Co., 71 Cal.App. 73, 76, 234 P. 442; Wetzler v. Patterson, 73 Cal.App. 527, 535, 536, 238 P. 1077; Wood v. Hipwell, 107 Cal.App. 680, 682, 683, 290 P. 1040; Harvey v. Weisbaum, 159 Cal. 265, 266, 268, 113 P. 656, 33 L.R.A.(N.S.) 540, Ann.Cas. 1912B, 1115.

[4-8] On the first point lessee's theory seems to be that a notice to pay rent or quit automatically terminates the lease. Such is not the law. Costello v. Martin Bros., 74 Cal.App. 782, 786, 241 P. 588 The lease is terminated only if the notice is acted upon by one of the parties. If the lessor had brought an unlawful detainer suit based upon the notices to quit, as they were framed in this case, then the court trying such unlawful detainer action would, upon a proper showing, have the undoubted right to decree a forfeiture of the lease. Ramish v. Workman, 33 Cal. App. 19, 21, 164 P. 26; Myers v. Herskowitz, 33 Cal.App. 581, 585, 165 P. 1031; Bonetti v. Treat, 91 Cal. 223, 230, 27 P. 612, 14 L.R.A. 151. Or, if the lessee within the three-day period specified in the notices had quit the premises, the respective lease would have been forfeited by agreement of the parties, since the lessee would be in the position of accepting lessor's offer to terminate the same. Costello v. Martin Bros., 74 Cal.App. 782, 786, 241 P. 588; Downing v. Cutting Packing Co., 183 Cal. 91, 96, 97, 190 P. 455. Neither of these methods was followed or taken advantage of by either of the parties. When a lessor, as did the lessor in this case, claims or collects rent in an action, or otherwise, as the result of a legal proceeding, or otherwise, he waives his existing right to effect a termination. The letter of January 4, 1933, which has been substantially excerpted, cannot be considered as a reiteration or extension of either of the previous notices. The object of a notice to quit is to lay the foundation for a forfeiture. The terms of the notice here involved are therefore strictly construed. Its terms were not extended by the letter, and the respective rights of the parties are governed by the precise terms of the notice. Code Civ. Proc. § 1161, subd. 2; Redmon v. Graham, 211 Cal. 491, 494, 295 P. 1031; Downing v. Cutting Packing Co., 183 Cal. 91, 95, 190 P. 455.

For the reasons stated in the foregoing opinion, it is ordered that the judgment be, and it is, affirmed.

We concur: YORK, J.; DORAN, J.

NEVILLE v. ST FRANCIS HOTEL AND APARTMENTS et al.*

Civ. 10670.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1936.

Rehearing Denied March 11, 1936.

Hearing Granted by Supreme Court April 16, 1936.

1. Bailment ⇐9

Where bailee has inspected object of bailment, law does not imply warranty that it is reasonably fit or capable for purposes for which bailee intends to use it.

2. Innkeepers ⇐10

Hotel owners *held* not liable on implied warranty to guest injured because of defect in folding bed, where guest inspected such bed prior to renting room.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 855.

3. Innkeepers ⇐10

Statement of hotel manager to guest, prior to renting room, that folding bed contained therein was as safe and comfortable as any bed guest had ever had or slept in *held* not to render owners liable on express warranty to guest injured because of defect in bed, since statement was mere expression of opinion.

4. Courts ⇐99(1)

Where plaintiff did not appeal from order granting defendants' motion for nonsuit as to cause of action based on negligence, judgment for plaintiff could not be predicated on negligence, since order had become final.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Adoree Neville against the St. Francis Hotel and Apartments and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Chase, Barnes & Chase, of Los Angeles, for appellants.

Shattuck, Davis & Story, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

Defendants appeal from a judgment in favor of plaintiff after a trial before a jury.

Viewing the evidence most favorable to plaintiff (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Plaintiff rented a furnished room from defendants, the owners and operators of the St. Francis Hotel. The room was equipped with a folding bed, which hung from a bracket on the floor and a bracket on the closet door jamb. The upper bracket was held by three heavy screws, each 3¼ inches long, screwed into the door jamb, and into two 2x4 timbers in the door frame.

January 29, 1935, plaintiff was lying in bed flat on her back when three screws which held the upper bracket to the door jamb broke, and the head and frame of the bed dropped on her face, causing her serious injury.

The causes of action alleged in the amended and supplemental complaint were:

Count 1. A breach of defendants' implied warranty that the bed was safe.

Count 2. Violation by defendants of an express warranty that the bed was safe and secure.

Count 3. Negligence on the part of defendants.

Defendants rely for reversal of the judgment on three propositions:

First. If a bailee has seen or inspected the subject of a bailment, the law does not imply a warranty on the part of the bailor as to the reasonable fitness or capability of the chattel.

Second. Defendants did not expressly warrant the folding bed to be safe and free from latent defects.

Third. A motion for a nonsuit having been granted to the third cause of action alleged in the supplemental and amended complaint, the judgment could not properly be predicated on negligence of the defendants.

[1,2] As to defendants' first proposition, if the bailee has inspected the object of the bailment, the law does not imply a warranty that it is reasonably fit or capable for the purposes for which the bailee intends to use it. Briggs v. Hunton, 87 Me. 145, 32 A. 794, 47 Am.St.Rep. 318; Gaffey v. Forgione & Romano Co., 126 Me. 220, 137 A. 218; 31 A.L.R. 544. In the instant case the uncontradicted evidence disclosed that plaintiff prior to renting the room from defendants inspected the folding bed which subsequently caused her injury. Therefore the jury could not have properly returned a verdict based on the first cause of action alleged in the supplemental and amended complaint.

[3] The second proposition presented by defendants is tenable. The evidence which plaintiff relies upon in support of her claim that there was an express warranty of the safety and fitness of the bed was the following conversation educed at the trial between the defendants' manager, Mr. Walsh, and plaintiff prior to the renting of the room:

"Q. What was the conversation? A. When I spoke about the apartment, the folding bed, I said it is a very lovely apart-

ment but I never did care for any folding beds. * * *

"Q. Say just what you were saying in this conversation. A. Yes. And he motioned to me—it was in the living room—and he motioned to me and he said come here, I'll show you. We went into this closet where this bed was folded in and he started to take the—lift up the covers which he did—I said you don't need to bother—when he said he was going to show me the box spring mattresses on the bed and I said, yes, it is different than the other beds I have had and he said, you won't have any trouble with it at all, and just as safe and comfortable as any bed I ever had or slept in. I would not have any trouble in sleeping."

The statements contained in the conversation above related were clearly nothing more nor less than expressions of opinion by Mr. Walsh and casual statements ordinarily to be expected from a hotel manager in displaying his rooms to a prospective guest. Steen v. Southern California Supply Co., 74 Cal.App. 265, 239 P. 1098; Williams v. Lowenthal, 124 Cal. App. 179, 12 P.(2d) 75.

[4] The final proposition presented by defendants is correct. Plaintiff has not appealed from the order granting defendants' motion for a nonsuit to the third cause of action in the supplemental and amended complaint. Therefore this order has become final and the judgment could not be predicated on negligence of the defendants.

The complaint and amendment thereto in the case of Fisher v. Pennington, 116 Cal.App. 248, 2 P.(2d) 518, relied upon by plaintiff as decisive of the instant case, discloses that each cause of action was based on the theory of negligence. The case is thus clearly distinguishable from the one now before this court.

The foregoing conclusions make it unnecessary to consider the other points discussed in the briefs. However, we are constrained to compliment counsel on both sides for the very careful and clear presentation of the points of law involved.

The judgment is reversed.

I concur: CRAIL, P. J.

I dissent: WOOD, J.

5 Cal.2d 405

SINGH et al. v. U. S. AMERICAN MALWA SUDHARAK SOCIETY et al.

Sac. 4938.

Supreme Court of California.

Feb. 26, 1936.

Corporations ⇐321

Evidence supported finding that funds of nonprofit corporation were properly used by its officers in defense of suit against corporation, its predecessor association and certain individual members of both, subsequent to dismissal of corporation as party defendant, where it was reasonably probable that attempt might be made to enforce any judgment obtained against corporation.

In Bank.

Appeal from Superior Court, San Joaquin County; Marion G. Woodward, Judge.

Action by Gurdit Singh and another against the U. S. American Malwa Sudharak Society, a nonprofit corporation, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Hubert H. Briggs, of Stockton, Sutherland, Deering & Jertberg, of Fresno, and Sydney C. Bennett, of Stockton (Frederick L. Felton, of Stockton, of counsel), for appellants.

George C. Carmody, of Martinez, Barry G. McDermott, of Stockton, and Harry Gottesfeld, of San Francisco, for respondents.

CONREY, Justice.

Appeal from judgment for defendants in an action in the nature of a suit for an accounting of corporate funds by officers of the corporation.

Defendant U. S. American Malwa Sudharak Society is a nonprofit religious and educational corporation which, prior to incorporation, existed as a voluntary association. The other defendants are members of the governing board, referred to as the working committee or board of directors of the corporation. Plaintiff Gurdit Singh is also a director, and his coplaintiff, Bagga Singh, a former director thereof. Plaintiffs brought this action on behalf of the corporation. Judgment having been entered in favor of defendants, the plaintiffs appeal therefrom.

The cause was tried on the third stated count of the complaint, wherein relief is sought by way of an accounting on behalf of the corporation from the individual defendants, of their use of the corporate funds. The gravamen of the case as stated in said third cause of action is that the defendant officers of the corporation unlawfully expended its funds for purposes not germane to its objects and for their own benefit, dissipating said funds to the detriment of the corporation and its general membership. In substantiation of said allegations, plaintiffs relied mainly on one transaction, namely, use of corporate funds to the amount of about $1,500 to finance the defense of a certain lawsuit against the corporation, its predecessor association, and various other persons, including the individual defendants herein, all presumably members of the corporation and of the association; and also the continued spending of corporate funds for defense of these individual defendants after a demurrer interposed by the corporation in said action was sustained and the corporation was dismissed therefrom as party defendant.

The plaintiff in said former action, one Dhandah, based his claims upon a contract purported to have been executed by and on behalf of the association, prior to its incorporation. Admittedly, up to the time the corporation was dismissed as party defendant therein, the directors were justified in using corporate funds for its defense. The question here was whether the acts of the directors after dismissal of the corporation, in supplying additional funds for defense of the remaining defendants, were ultra vires and fraudulent. On this issue, the court made findings in favor of the defendants. It is contended by appellants that the evidence is not sufficient to support these findings.

The record contains ample support for the findings. Even after judgment in favor of the corporation in said former action, the corporation was interested in seeing that there be no judgment obtained against the individual defendants and the association which might be used as the basis of an action against the corporation to follow into its hands assets of the association which had been transferred to the corporation, and received by it, without consideration, as successor to the as-

sociation. It was reasonably probable that such subsequent action might successfully be prosecuted. Estate of Scrimger, 188 Cal. 158, 206 P. 65; Atkinson v. Western D. Syndicate, 170 Cal. 503, 150 P. 360.

As the above holding requires an affirmance of the judgment, it becomes unnecessary to give attention here to the additional stated ground of appeal, wherein appellants contend that the trial court erred in its ruling to the effect that the plaintiffs had no capacity to maintain this action.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.



5 Cal.2d 387

CRANE v. STEVINSON et al.

Sac. 4924.

Supreme Court of California.

Feb. 25, 1936.

1. Waters and water courses ⇐130

Under constitutional amendment relating to conservation of water and statutory provision that all waters flowing in any stream or other natural channel are subject to appropriation, "foreign waters" in stream *held* subject to appropriation by riparian owners (Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

2. Easements ⇐54

Where right is acquired by use or prescription, nature of use cannot be changed so as to render it more burdensome upon servient tenement.

3. Waters and water courses ⇐145

Burden of easement acquired by irrigation district to waste water into channel of creek *held* not increased as to lower riparian owner by agreement for carrying of water for benefit of riparian owner whose lands were below servient tenement (Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

4. Waters and water courses ⇐152(11)

Decree affirming right of owner of land riparian to river to carry foreign water diverted from river above land through creek flowing through intervening owner's property and to reclaim such water *held* limited by finding that right to reclaim foreign water was by virtue of statute prohibiting diminishing of appropriated waters of another in reclaiming such water (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

5. Waters and water courses ⇐142

Right of riparian owner to reclaim foreign water which had previously been appropriated and discharged into creek flowing into river to which owner's land was riparian *held* not affected or diminished by fact that channel of creek was part of land of another (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

6. Waters and water courses ⇐156(2)

Deed conveying all rights in water from river upon which grantor's land was situated *held* not to include riparian rights incidental to ownership of riparian land, especially where, in subsequent grant, grantor's successor attempted to preserve riparian rights (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

7. Waters and water courses ⇐152(11)

Decree which allowed plaintiff and defendant status of riparian owners in relation to their own land, but declined to apportion water of creek between land of plaintiff and defendant, would not estop plaintiff from maintenance in subsequent action of all rights as riparian owner in relation to natural flow of streams to which land was riparian (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

8. Waters and water courses ⇐152(6)

Plaintiff in action to establish right to water of which he claimed to be owner by appropriation had burden to establish fact of appropriation by him and quantity of water appropriated and applied by him to beneficial use upon land (Civ.Code, § 1413; Gen. Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

9. Waters and water courses ⇐152(6)

To sustain claim of appropriation of natural and foreign waters in stream, riparian owner who had not filed application with water commission was required to show that appropriation was complete prior to enactment of statute requiring application to water commission, and that beneficial use of water was maintained for period of time prescribed by statute or required under decisions prior to enactment thereof (Gen. Laws 1931, Act 9091, §§ 11, 17, 20a; Civ. Code, § 1411).

10. Waters and water courses ⇐152(8)

Evidence *held* to justify decree denying claim of riparian owner as prior appropria-

tor of foreign water in creek on ground that owner had not appropriated water of creek and was not owner of any right therein except as riparian owner (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

11. Waters and water courses ⇐142

Lower riparian owner *held* entitled to reclaim, as foreign water, water carried into river by creek into which it was discharged after appropriation and use by irrigation district, as against contention that such water was abandoned after use by irrigation district so as to become part of natural water of creek and subject to appropriation by owner of land riparian thereto (Civ.Code, § 1413; Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Const. art. 14, § 3).

12. Waters and water courses ⇐130

Merced river waters diverted by irrigation district and discharged through creek into tributary of Merced river *held* subject to riparian rights of owner of land above and below junction of Merced river and tributary, although foreign to owner of property riparian to intervening creek, and hence subject to appropriation by lower riparian owner (Gen.Laws 1931, Act 9091, §§ 11, 17, 20a; Civ.Code, § 1411; Const. art. 14, § 3).

In Bank.

Appeal from Superior Court, Merced County; T. R. Thomson, Judge.

Action by C. A. Crane against J. J. Stevinson and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Treadwell, Laughlin & Treadwell and Edward F. Treadwell, all of San Francisco, for appellant.

George J. Hatfield, of San Francisco, for respondent Stevinson.

Fred B. Wood, of San Francisco, for respondent East Side Canal & Irrigation Co.

Norris J. Burke, of Sacramento, for respondent Stevinson Water District.

Richard H. Fudge, of counsel, for respondents.

CONREY, Justice.

The plaintiff is the owner of a tract of land, including particularly sections 7, 8, 17, and 18 in township 8 south, range 12 east, in the county of Merced, and riparian to a natural water course known as Bear creek. In bringing this action, besides asserting all the rights of a riparian owner in and to the natural flow of the waters of the creek, plaintiff by his complaint claims to be the owner by appropriation of the right to take, divert, and use upon his said land 50 cubic feet per second of water of said creek, and of the right to capture the said water upon his land and to use and enjoy the same thereon, for the irrigation of his land and for the watering of livestock. This action was brought to quiet title of the plaintiff to the right thus claimed by him, and by decree to enjoin the defendants from in any way interfering with the plaintiff in so capturing, possessing, using, and enjoying said water.

The particular subject of controversy herein relates to the right of control and use of a part of the stream designated as "foreign water." This is water, not from the natural sources of supply of Bear creek, but is water which after diversion from another watershed to lands between the place of origin and Bear creek, has been recovered and turned into the creek at points above the plaintiff's land. The place of origin of the foreign water is at a point or points of diversion from the Merced river. The intervening territory to which the water was taken is north and east from the plaintiff's land, and is now within the boundaries of Merced Irrigation District. This district, and its predecessor, Crocker-Huffman Land & Water Company, have, for upward of fifty years last past, diverted water from the Merced river to said intervening territory by means of a canal maintained by them, and have created said "foreign water" supply by allowing the surplus and unused water from their canal to drain into the channels of Bear creek above the plaintiff's land.

Bear creek empties into the San Joaquin river at a place below and westerly from the plaintiff's land, and several miles above the junction of the San Joaquin with the Merced river. The defendant J. J. Stevinson, a corporation, owns land which lies partly above and partly below the junction of the two rivers, so that it is riparian partly to the San Joaquin river and partly both to the San Joaquin and to the Merced river. It is to be noted, however, that in this action the plaintiff introduced in evidence deeds of conveyance by reason of which he contends that the predecessor of Stevinson conveyed to others all of the riparian rights pertaining to said Stevinson lands.

In February, 1930, there was pending an action between Stevinson, claiming as riparian owner on the Merced river, and Merced Irrigation District, concerning water rights in Merced river. In a settlement be-

tween the parties to that action, the district made an agreement (confirmed by decree of the court) to deliver in the channel of Bear creek, at the district's boundary (which is above the plaintiff's land), a certain quantity of water, and granting to Stevinson the right to take for its own use all the water discharged by the district's operations into the channel of the creek. This included, of course, the "foreign water" to which we have referred. Shortly thereafter, on August 12, 1931, the plaintiff brought this action in order to obtain a determination as to the respective rights of plaintiff and defendants in view of the new conditions thus created. Trial of this action resulted in a decree, from some parts of which the plaintiff appeals.

Defendant East Side Canal & Irrigation Company is the owner of a canal which takes water out of the San Joaquin river and crosses Bear creek on the land of plaintiff, and runs to the Stevinson land. The only way Stevinson can take the water released into Bear creek is through this canal after the water has reached the land of the plaintiff. Defendant Stevinson Water District, a corporation, is a district formed, but not operating, for the purpose of irrigating a part of the Stevinson land.

On July 20, 1931, the East Side Company filed with the division of water rights an application for the appropriation of certain water of Bear creek. Likewise, on November 5, 1928, certain predecessors of Stevinson Water District filed a like application, and also on October 12, 1927, other predecessors of Stevinson Water District filed a like application. These proceedings are still unperfected. Under these applications defendants claim both the natural flow and any foreign water in the creek. Since the enactment of the Water Commission Act (St. 1913, p. 1012, as variously amended, Deering's Gen.Laws 1931, Act No. 9091), acquisition of water rights by appropriation is regulated by the provisions of that law. Among other things, it is provided (section 16) that every application for a permit to appropriate water shall set forth certain required facts, including descriptive statements of the proposed use. Section 17 reads, in part, as follows: "Any person, firm, association or corporation may apply for and secure from the state water commission, in conformity with this act and in conformity with reasonable rules and regulations adopted from time to time by the state water commission, a permit *for any unappropriated water or for water which having been appropriated or used flows back into a stream,* lake or other body of water within this state. And any application so made shall give to the applicant a priority of right as of the date of said application to such water or the use thereof until such application shall have been approved or rejected by said commission; provided, that such priority shall continue only so long as the provisions of law and the rules and regulations of the water commission shall be followed by the applicant." And section 1c of the act says: "No right to appropriate or use water which is subject to the provisions of this act shall be initiated or acquired by any person, firm, association, or corporation except upon compliance with the provisions of this act."

By the decree in this action the validity of the applications above mentioned, as filed with the division of water rights, is affirmed and it is declared that the defendants are the owners, severally, of the inchoate right to appropriate stated quantities of water of Bear creek, with priority as of the said days of filing; and that said right by appropriation extends both to the natural flow of said creek and to any foreign water abandoned into said creek, but the said right is of no validity as against the plaintiff, so far as the natural flow of said creek is concerned. The aggregate quantity of water included by said "inchoate rights" of appropriation amounts to 239 cubic feet per second of the waters of said creek.

Paragraph VII of the decree herein reads as follows: "That the defendant James J. Stevinson, a corporation, owns and is entitled to carry through the channels of Bear Creek and in the channels of said creek through the lands of the plaintiff and to divert into the canal of the East Side Canal & Irrigation Company, all foreign water which is released by Merced Irrigation District from its irrigation system or any part thereof and/or its drainage system or any part thereof, and/or its seepage and/or run-off from lands situate within the boundaries of said district, and which water is caused or allowed by the district to flow in the channels of said creek down to said western boundary of the district for the purpose of delivery thereof to said defendant James J. Stevinson. Said water so caused or allowed to flow in said channels to said western boundary by Merced Irrigation District for the purpose of delivering the same to said

defendant is not abandoned water and is not subject to be captured or appropriated by the plaintiff."

Paragraphs I and II of the decree fully recognize plaintiff's rights as owner of lands riparian to Bear creek. Those paragraphs read as follows:

"I. That the lands of the plaintiff described in the complaint are riparian to Bear creek, and the said plaintiff as the owner of said land is entitled to all of the rights of a riparian owner with respect of the said Bear Creek, and as against the defendants East Side Canal & Irrigation Company, a corporation, and Stevinson Water District, a corporation, is entitled to take, divert and use all of the waters of the natural flow of the said creek upon his said riparian lands; and as against the defendant J. J. Stevinson, a corporation, plaintiff is entitled to make a reasonable use of the waters of the natural flow of said creek, having due regard to the like right of said defendant to make a like reasonable use of the waters of said creek upon its land riparian thereto.

"II. That the said riparian right of the said plaintiff does not extend to any water flowing in said creek which has its origin in the Merced River; and particularly does not extend to water diverted from the Merced River by the Merced Irrigation District and discharged into said creek."

By paragraphs VIII and IX of the decree the court gave recognition to the claims of respondent Stevinson, as owner of land riparian to the San Joaquin river, with the right to make reasonable use of the natural flow of Bear creek upon its said riparian land, "having due regard for the like right of plaintiff." Also the court determined that said Stevinson, "as the owner of lands riparian to the San Joaquin River below the mouth of the Merced river, * * * is entitled to have any of the waters of the Merced river which are abandoned by the Merced Irrigation District into Bear Creek flow down the channel of the said Bear Creek to the San Joaquin River and to the said lands of said defendant, and is entitled to make a reasonable use thereof upon its riparian lands."

In the light of the issues presented and the decision of the trial court as above set forth, we may now examine appellant's stated grounds of appeal. The several points stated, omitting those which require no discussion, are: I. That any water which has its origin in the Merced river and is wasted or seeps into Bear creek is foreign water which the plaintiff, on account of the advantage of position, is entitled to capture and reduce to possession. II. That the respondents have no right or easement to carry foreign water through the land of appellant in the channel of Bear creek. V. That the applications under the Water Commission Act for the appropriation of the water of Bear creek are of no validity so far as foreign water is concerned. VI. That the respondent Stevinson Company has no riparian rights, because its predecessor conveyed away all such rights. VII and VIII. That the respondent Stevinson Company has granted away a large part of its riparian rights by an agreement, dated March 19, 1928, with Southern California Edison Company; and the Stevinson Company has granted away a large part of its riparian rights by an agreement dated the 21st of January, 1929, with the San Joaquin & Kings River Canal & Irrigation Company, Incorporated; Miller & Lux Incorporated, Firebaugh Canal Company, San Luis Canal Company, Columbia Canal Company, and Gravelly Ford Canal Company. IX. That appellant appropriated the water of Bear creek, including the foreign water therein, prior to the Water Commission Act. X. The judgment permits the Stevinson Company to recapture water which is in law and fact water of the stream or abandoned water. The foregoing propositions will now be considered in the same order as above stated.

[1] In support of point I, appellant relies chiefly upon the case of E. C. Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417, where there are some statements to the effect that foreign water, like wild animals, is subject to seizure by the first person who is in a position to physically seize it, and that the right which the person seizing it acquires is a right in the corpus of the water seized, and that he obtains no other right thereto. To like effect appellant cites Dannenbrink v. Burger, 23 Cal.App. 587, 138 P. 751. Viewed in that light the appropriation or seizure of such water would not confer any right to have the water continue to flow to the point of diversion as in the case of other appropriations. But we find ourselves unable to agree with the proposition that foreign water rights may not be acquired by appropriation. In the Horst Case, supra, this court, in denying a rehearing (177 Cal. 631, at page 641, 171 P. 417, 421), made the following reservation: "The court does

not construe the opinion herein as deciding the question as to what rights may be acquired in so-called 'foreign waters,' as between appropriators, or by prescription." The quoted statement implies recognition of the possibility of appropriation of foreign waters. In view of the later definition of state policy in relation to the conservation and use of water, as expressed in the Water Commission Act, and in the recent constitutional amendment (article 14, § 3) on that subject, there should remain no present doubt that the so-called foreign waters are now subject to appropriation under the laws of this state. The fact that, where such waters have been brought into a stream as the result of abandonment by another appropriator, there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriation right, but does not affect the existence of the right, subject to the limitation caused by the nature of the water supply in question. In section 11 of the Water Commission Act it is provided that all waters flowing in any river, stream, canyon, ravine, or other natural channel (with stated exceptions) "is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act."

[2, 3] Under point II, appellant admits that Merced Irrigation District has an acquired right to waste water into the channel of Bear creek. Such water, he says, as soon as it is wasted, becomes abandoned. "Appellant make no objection to *such* water being abandoned and wasted into Bear Creek; but he contends that the easement which the District acquired by use to waste the water into the channel cannot now be changed, for the purpose of carrying out the agreement made with J. J. Stevinson, a corporation, dated the 29th day of October, 1929, into an easement to carry water for the benefit of that company." It is the rule, of course, that where a right is acquired by use or prescription, the nature of the use cannot be changed so as to render it more burdensome upon the servient tenement. We think, however, that in this instance there has not been any increase in the burden imposed by the easement, which now, as before, consists chiefly of the right to turn into the channel of Bear creek, above the land of plaintiff, water taken from the Merced river and not absorbed by the use for which it was taken.

[4, 5] Those terms of the decree which affirm the right of Stevinson to carry foreign water through the channel of Bear creek are supported by the findings, including finding X, wherein it is stated that Stevinson and the district have the right to carry said water in said channel, "and to reclaim the same, but without diminishing the quantity or impairing the quality of other waters flowing in the stream or exceeding the safe carrying capacity of said creek through said land or injuring said land by overflow from the channels or by silting or otherwise, which right they have by virtue of the right granted by section 1413 of the Civil Code of California and the declaration of such right made by the courts of this state prior to the issuance of a patent to said land." Said section 1413 refers to appropriated waters, and reads as follows: "The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished." The provisions of the decree, affirming the right of Stevinson to have any of said abandoned waters flow down the channel of Bear creek to the San Joaquin river and to the land of Stevinson, and to make reasonable use thereof upon its riparian land, are limited by the findings, and are to be interpreted in accordance therewith. The rights of Stevinson, as thus affirmed, are not affected or diminished by the fact that the channel of Bear creek, considered as land, is part of the land belonging to appellant. To hold that they are so affected or diminished, would be inconsistent with the admitted right, acquired as hereinabove stated, to have the said "foreign waters" flow down the channel of Bear creek.

Referring to appellant's point V, that the applications under the Water Commission Act for the appropriation of the water of Bear creek are of no validity so far as foreign water is concerned, he insists that the Water Commission Act applies to natural water of streams, and not to foreign water. In our discussion of point I, we have reached the opposite conclusion on this question.

[6] Next it is contended (point VI) that respondent Stevinson, a corporation, has no riparian rights, because its predecessor conveyed away all such rights. The predecessor of J. J. Stevinson, a corporation, was J. J. Stevinson, a natural person, who

in December, 1903, conveyed to the corporation the riparian lands hereinbefore mentioned as owned by said corporation. In November, 1886, Mr. Stevinson had recorded a notice of appropriation of 300 cubic feet per second of the water of the San Joaquin river. In March, 1898, he executed to East Side Canal & Irrigation Company the deed which appellant here contends was a conveyance of all his riparian rights as owner of the land now owned by respondent Stevinson, a corporation. The property conveyed by this deed was therein described as being "all right, interest or estate, in, to or to take water from the San Joaquin River, also to any water appropriated by said party of the first part, by written notice or by actual diversion, or otherwise, also all rights, interest and estate now in and to any water flowing or which may hereafter flow in the said San Joaquin River, which has been acquired by the party of the first part in any manner whatever, including all rights, interests, estates and privileges which may grow out of, or result from any act or thing done or performed by the said party of the first part, or by any other person in his behalf." It should be noted that this deed omits any reference to land owned by the grantor, or to any riparian rights belonging to him as a landowner. On the other hand, it directly mentions his water rights as an appropriator. It does contain some more general words of description which might cover all rights of the grantor to waters flowing in the river, acquired by him "in any manner whatever." But this does not necessarily include, and we think that it never was intended to include, the riparian rights which were only incidental and pertaining to his ownership of riparian lands. Furthermore, in subsequent grants the Stevinson corporation was at pains to preserve unaffected the riparian rights which it is fair to assume it had theretofore retained.

[7] Respecting appellant's points VII and VIII, we are likewise convinced that there is no merit in those propositions, wherein appellant contends that respondent Stevinson has granted to others "a large part of its riparian rights." Although the court (see finding IV) specifically declined to apportion the water of the natural flow of Bear creek between the lands of appellant and the lands of Stevinson, nevertheless, by reason of the adjudication herein, allowing to Stevinson as well as to appellant the status of riparian owner, each in relation to his own land, appellant fears that in any subsequent action between him and Stevinson to enforce riparian rights, the apportionment would not be made, as it should be "in accordance with the actual rights which the respondent really owns after the conveyances aforesaid." In view of the reservation made by the court, as above noted, we think that the decision and decree herein would not estop appellant from complete maintenance in any such subsequent action, of all his rights as riparian owner, in relation to the natural flow of the stream or streams to which his land is riparian. The question of the proportion of such waters to which the several parties are entitled, having been directly withdrawn by the court by the very terms of its decision, that question is out of the case. And in fact it never was a substantial element in the present controversy.

[8-10] Appellant contends (point IX) that he appropriated the water of Bear creek, including the foreign water therein, prior to the Water Commission Act. On this issue of fact, tendered by appellant's amended complaint, the court (finding IV) made some statements of evidentiary facts, followed by a finding of ultimate fact, viz., that plaintiff did not appropriate any water of Bear creek, and is not the owner of any right therein acquired by appropriation, "except that he has the right to make such use thereon of the waters of the natural flow of said Creek as he may be entitled as riparian owner of said land riparian to said Creek."

The burden was upon appellant, to establish by sufficient evidence the fact of appropriation by him, and the quantity of water appropriated and applied by him to beneficial use upon his land. Northern Cal. Power Co. v. Flood, 186 Cal. 301, 303, 199 P. 315. On this issue plaintiff's evidence is defective and incomplete. It fails to show the quantity of water diverted by plaintiff from Bear creek, or how much, if any, of the water taken by him from the main canal of East Side Canal Company was water derived from Bear creek. It fails to show how much, if any, of the water taken by him out of Bear creek was taken as an appropriator and not in the exercise of his rights as a riparian owner. Since the effective date (year 1913) of the Water Commission Act, an intending appropriator has been required to file his application with the water commission (now the division of water resources). This the

plaintiff did not do. To sustain his claim, the appropriation made by him must have been actually complete at some time prior to said 1913 date, and even that is not sufficient if the evidence shows a subsequent failure to maintain the beneficial use for the period of time prescribed by the statute, or for the period of time, five years, required under decisions prior to the statute. Water Commission Act, § 20a, Deering's Gen.Laws, 1931 Ed., Act No. 9091; Civ.Code, § 1411; Smith v. Hawkins, 110 Cal. 122, 42 P. 453; Smith v. Hawkins, 120 Cal. 86, 52 P. 139; Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994. We conclude that the findings on this issue are sustained by the evidence.

[11, 12] Finally appellant suggests that the decree is erroneous in that it permits respondent Stevinson to recapture water which is in law and in fact water of the stream, or abandoned water. This refers to paragraph VII of the decree, which affirms the right of Stevinson to carry through the channels of Bear creek and into the canal of the East Side Canal & Irrigation Company all *foreign* water which is released by the district from its irrigation or drainage system, or is seepage or run-off from lands within said district, and which water is caused or allowed by the district to flow in the channels of Bear creek down to the western boundary of the district for the purpose of delivery thereof to Stevinson.

It will be noted that the reference here is to "foreign water," and that this foreign water, as distinguished from water naturally flowing in the creek, is principally if not entirely composed of water which came into this territory after diversion from the Merced river. This objection of appellant, therefore, merely presents in another form appellant's attack upon the right of respondents to reclaim and utilize these foreign waters after the long period of their abandonment. The decision which we have announced upon the other grounds of appeal, particularly with reference to the right to reclaim such waters, necessarily leads to the conclusion that this last point is without merit. In addition it is suggested by respondents, and we think correctly suggested, that the water in question is not foreign water with respect to all of the lands of respondent Stevinson. Nearly 2,600 acres of that land has frontage on the San Joaquin river below its junction with Merced river. Consequently that land is riparian to the Merced river as well as to the San Joaquin and its tributaries. It was for this reason that the court determined in its decree that respondent Stevinson is entitled to have any of the waters of the Merced river which are abandoned by Merced Irrigation District into Bear creek, flow down the channel of the said Bear creek and to the lands of said defendant, and is entitled to make reasonable use thereof on its riparian lands.

In Holmes v. Nay, 186 Cal. 231, 199 P. 325, the plaintiffs were lower riparian owners on a main stream, and the defendant was taking water from the main stream and using a portion of it on his riparian land in the watershed of a tributary stream. Of this the court held the plaintiffs could not complain, saying: "Both watersheds are but parts of the watershed of the stream as it passes the plaintiffs' lands, and the rule that the owner of a tract of riparian land may not convey and use the water without the watershed of the stream has no application. The water is not conveyed and used without the watershed of the stream which passes the plaintiffs' lands, and that stream is the stream in which the plaintiffs have rights. They have no rights in the main stream and the branch above as separate streams. The situation is the exact converse of that presented in Anaheim, etc., Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L.R.A.(N.S.) 1062, where the junction of the stream and the branch was below the lands of the complaining riparian owner. Any other rule would be wholly impracticable and would, in many cases, practically destroy the riparian rights of an upper owner." 186 Cal. 231, at pages 240, 241, 199 P. 325, 330. In Southern Cal. Investment Co. v. Wilshire, 144 Cal. 68, 77 P. 767, wherein the plaintiff was a riparian proprietor, it appeared that notwithstanding the diversion of the water from the stream by the defendants and its use upon their lands for irrigation, a part thereof again reached the stream and the point of diversion of the plaintiff. Of this feature the court said: "The plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through his lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received." 144 Cal. 68, at page 73, 77 P. 767, 769. We agree with respondents that the principle thus an-

nounced applies to the so-called foreign water which is the subject of this controversy, and that respondent Stevinson has riparian rights thereto; also that as to such waters appellant has no claim, his land being riparian solely to Bear creek and hence foreign to Merced river waters flowing towards the San Joaquin river.

After careful consideration of appellant's stated grounds of appeal, we conclude that the findings are sustained by the evidence and are in law sufficient to support the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.



11 Cal.App.2d 576

PEOPLE v. RUBENS et al.

3 Cr. 1448.

Supreme Court of California.

Feb. 27, 1936.

Licenses ⇐42(2)

In prosecution for violation of Corporate Securities Act, good faith of defendant in not securing permit from corporation commissioner for sale of securities constituted no defense (St.1917, p. 673, as amended by St. 1931, p. 950).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Si Rubens, F. L. Appleton, and Gregory Linder were convicted of grand theft, conspiracy to commit a crime, and violation of the Corporate Securities Act (St. 1917, p. 673, as amended by St. 1931, p. 950). The District Court of Appeal reversed the judgments of conviction and remanded the cause for new trial [54 P.(2d) 98], and the People petition for a hearing.

Petition denied.

Frank G. Warren, of Stockton, and Lester R. Godward, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

In denying the petition for a hearing in this case after decision by the District Court of Appeal of the Third Appellate District, we disapprove of any intimation which may be drawn from the language of the last paragraph of the opinion, to the effect that the good faith of defendants with respect to the necessity of securing a permit for the sale of the security is a matter of defense.



5 Cal.2d 324

CENTRAL NAT. BANK OF OAKLAND v. BELL et al.

Sac. 4929.

Supreme Court of California.

Feb. 11, 1936.

Rehearing Denied March 12, 1936.

1. Mortgages ⇐350

Sale of realty outside of county in which it was situated pursuant to trust deed authorizing sale at such place *held* not invalid, where trust deed was executed prior to enactment of statute requiring sales to be held in county in which property is situated (Code Civ.Proc. § 694, as amended by St.1931, p. 2499).

2. Quieting title ⇐44(2)

In action to quiet title and recover possession of realty purchased at sale pursuant to trust deed, evidence that notices of sale were not posted as required by statute *held* inadmissible, where trust deed provided that recitals in trustee's deed of default, request to sell, publication, and posting of notice, postponement of sale, etc., should be conclusive evidence thereof (Code Civ.Proc. § 692, subd. 3).

3. Quieting title ⇐43

In action to quiet title to property purchased by plaintiff at trustee's sale pursuant to trust deed, allegations of fraud *held* not to entitle defendant to attack truth of recitals in trustees' deed and appropriate exercise of powers conferred thereunder in absence of proof of actual fraud or oppression committed by trustees (Code Civ.Proc. § 692, subd. 3).

4. Mortgages ⇐369(3)

Mere inadequacy of price is insufficient ground for setting aside trustees' sale of mortgaged property which is legally conducted, in absence of fraud, unfairness, or oppression by which result is brought about.

5. Quieting title ⇐44(2)

In action to quiet title to property purchased by plaintiff at trustees' sale pursuant to trust deed, evidence of market value of property *held* inadmissible in absence of offer to prove additional essential elements of fraud, unfairness, or oppression by which sale for inadequate price was brought about.

6. Quieting title ⇐44(4)

In action to quiet title, proof of title beyond common source of title claimed by plaintiff and defendants *held* unnecessary.

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge pro tem.

Action by the Central National Bank of Oakland against Henry Bell and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

James F. Peck, of San Francisco, for appellants Louis M. Hickman and others.

Henry C. McPike, of Oakland, and C. F. Rafferty, of San Francisco, for appellants Charles V. Niderost, and others.

Elizabeth M. Maxwell, of San Francisco, for appellant Henry Bell.

Louis W. Jefferson, of Oakland, for appellants Carrie L. Dallas and others.

Garland Ruddle in pro per.

Fitzgerald, Abbott & Beardsley, Charles A. Beardsley, and James H. Anglim, all of Oakland, for respondent.

SHENK, Justice.

The plaintiff, an insolvent national banking association, acting through its duly qualified receiver, brought this action to quiet its title to, and to recover possession of, 8,000 acres of land consisting of town lots and acreage, situated partly in Stanislaus county and partly in Merced county. Some of the answering defendants denied the plaintiff's title deraigned through sales under deeds of trust and alleged fraud and conspiracy in the conduct of the sales thereunder. The issues were tried, some before the court with a jury, and the equitable issues by the court without a jury. The court granted the plaintiff's motion for a directed verdict on the issues tried before the jury. Judgment for the plaintiff was entered pursuant to the verdict so directed and the findings of the court. This appeal followed.

In 1930 the defendant Louis M. Hickman, a corporation, owned the land in question. In that year it executed its deed of trust conveying the land as security for the repayment to the plaintiff of a loan of $71,000. Subsequently the corporation deeded the land to the defendant Progressive Land & Development Company. The corporation's default in payment occurred, and in 1931 the trustees conducted a sale of the property pursuant to notice which designated the city of Oakland, county of Alameda, as the place of sale. At the time and place so noticed, the property was offered en masse and was sold to the plaintiff bank for the sum of $76,000; the plaintiff having been the highest bidder. Subsequently the bank conveyed the property to the defendant Henry Bell, who was a nominee of the Progressive Land & Development Company, in return for a note and deed of trust on the property securing payment of $76,000 to the plaintiff. Default was committed under this note and trust deed and a second trustee's sale was held in the county of Stanislaus. The original published time for the sale was April 26, 1933. The sale was not concluded on the day noticed, but by oral proclamation, in accordance with the provisions of the trust deed, the sale was postponed four times until it was finally consummated on August 8th. The land was first offered in parcels with the statement that the trustees reserved the right to offer the property also en masse and to consummate the sale pursuant to whichever method brought forth the larger aggregate bid for the property. At the sale, the defendants Ruddle and Niderost, acting for themselves and other defendants, bid the aggregate sum of $2,027 for the town lots and parcels of 40 acres or less; the bid including 2,027 acres. No separate bids were made on the remaining acreage. The trustees thereupon offered the property en masse. The plaintiff bid the sum of $85,000, and, there being no other bids, the trustees elected to sell the property to the plaintiff for that price.

[1] The defendants first contend that the sale under the first deed of trust was

invalid because it was held in Oakland, which is outside the counties where the property is situated. The first deed of trust, which was executed on January 23, 1930, expressly provided that the "place of sale may be either in the county in which the property to be sold is situated or in the city of Oakland, County of Alameda, State of California." In 1931 the Legislature (St. 1931, p. 2499) amended section 694 of the Code of Civil Procedure, effective prior to the date of sale under the first deed of trust, to provide that "all sales of property under execution or under power contained in any deed of trust hereafter executed must be held in the county where said property or some part thereof is situated." The trust instrument, however, was not one executed after the effective date of the amendment to said section. Inasmuch as it expressly authorized the sale to be held in Alameda county there was no invalidity by reason of the sale having been held in the city of Oakland. San Diego Improvement Co. v. Brodie, 215 Cal. 97, 8 P.(2d) 1027; Mortgage Guarantee Co. v. Smith (Cal. App.) 50 P.(2d) 835.

[2] The defendants on the trial endeavored to show that the notices required by section 692, subd. 3, Code Civ.Proc., did not remain posted for twenty days prior to the date of sale. The evidence was held inadmissible and excluded by the court. The court did not err in its ruling. It is sufficient in this respect to note that the trust deeds provided that, in event of sale thereunder, the recitals in the trustees' deeds, of default, request to sell, publication, and posting of notice, postponements of sale, etc., should be conclusive evidence of all such facts recited. In this action and on the record before us the defendants were concluded by the recitals in the trustees deeds. Sorensen v. Hall, 219 Cal. 680, 28 P.(2d) 667; Stevens v. Plumas Eureka Annex Mining Co., 2 Cal.(2d) 493, 41 P.(2d) 927.

[3-5] The case before us involves only the question of the legal title. The defendants sought to sustain their allegations of fraud by proof of such matters only as that the notices were not kept posted for twenty days; that the notices were not posted twenty days prior to the date of actual sale as distinguished from the day noticed for the sale; that notice of the various postponements were not posted on the property; that the sales en masse rendered them invalid; that the procedure followed at the second sale in offering the property first in parcels and then en masse rendered the sale invalid in the absence of notice to that effect in the published notice of sale, and that the defendants were entitled to have their bids at such sale accepted; that the trustees failed to make a personal examination of the property to acquaint themselves with its value and to see that notices had been posted, and by such examination to ascertain personally the truth of the recitals in the trustees' deeds; and that the sales were at prices less than the reasonable market value of the property. All of these matters either were concluded by the recitals in the trustees' deeds or were in the exercise of the power expressly conferred by the provisions of those instruments. Merely alleging fraud cannot be deemed to open wide the door to the defendants to attack the truth of the recitals in the trustees' deeds and the appropriate exercise of the powers conferred thereby, in the absence of any proof of actual fraud or oppression committed by the trustees, and none was offered. None of the matters relied on by the defendants could, either separately or together, give rise even to a surmise that any fraud was committed by the trustees in the conduct of the sales under either of the trust deeds. On the contrary, it appears obvious from the facts before us that the trial court was justified in concluding that at both sales the trustees disposed of the property in the manner best calculated to induce the greatest return for the property. Furthermore, at the trial the plaintiff offered to reconvey the property on payment of the amount of the debt, and its offer was refused. This offer, and the bids averaging $1 an acre made by certain of the defendants for a portion of the property at the second sale, are scarcely consistent with the badge of fraud sought to be impressed by reason of any disparity between the amount for which the property was sold and its market value. It is no new doctrine in this state that mere inadequacy of price is not sufficient ground for setting aside a trustee's sale legally conducted, in the absence of proof of some element of fraud, unfairness or oppression by which the result is brought about. Stevens v. Plumas Eureka Annex Mining Co., supra. The court therefore did not err in ruling out

evidence of market value in the absence of any offer to prove the additional essential element.

[6] It is also urged that the plaintiff should have offered evidence of title beyond the proof of title in the defendant Louis M. Hickman corporation. That corporation was the common source of the title claimed by the plaintiff and the other defendants. In such a case it is unnecessary to offer proof of title beyond such common source. Sorensen v. Hall, supra.

Other grounds for reversal have been examined and found to be without merit.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; CONREY, J.; SEAWELL, J.



5 Cal.2d 377

SCHULTZ v. TOWN OF LAKEPORT et al.*

Sac. 4989.

Supreme Court of California.

Feb. 24, 1936.

1. Waters and water courses ⇐203(1, 13)

Water company, whether privately or publicly owned, has right to require compliance with reasonable rules for service to customers and payment of sums due for such service, and to provide for discontinuance of service for violation thereof.

2. Waters and water courses ⇐203(13)

Water consumer will not be granted relief because of water company's discontinuance of service for nonpayment of water bill where consumer has not presented basis for bona fide dispute of amount claimed to be due.

3. Waters and water courses ⇐203(13)

Where facts indicate there is ground in good faith to dispute correctness of amount claimed by water company of consumer, the consumer, upon tendering rate for current term, is entitled to have service continued pending settlement of disputed overdue account.

4. Judgment ⇐725(5)

In water consumer's action for damages due to discontinuance of service by town, owning its water system, for failure to pay account, consumer's good faith in disputing account could not be inquired into in view of judgment in former action on account against consumer which determined that part of bill rendered by town was not collectible.

5. Waters and water courses ⇐203(13)

Water consumer's action for damages due to wrongful discontinuance of service by town, owning its water system, was not barred because consumer did not bring proceeding for injunction to restrain threatened discontinuance of service.

6. Waters and water courses ⇐203(13)

Consumer has right to recover damages for wrongful cutting off of water supply.

7. Waters and water courses ⇐203(13)

Summary power of shutting off water to coerce payment of current bills or water rent is vested in water company, but such right is not deemed to exist concurrently with necessity to litigate claim disputed in good faith.

8. Damages ⇐62(1)

Water consumer who is entitled to damages because his service was wrongfully discontinued may not recover damages which have accrued by reason of consumer's failure to do everything reasonable in his power to reduce injuries which would otherwise ensue by discontinuance of service.

9. Damages ⇐62(1)

Plaintiff must employ all reasonable means to render his injury as light as possible.

10. Damages ⇐62(1)

Rule that a water consumer must do all possible to reduce injury which would otherwise ensue by wrongful discontinuance of water service does not require consumer to obtain water if cost of obtaining it would be out of proportion to damages ensuing or would be otherwise unreasonable.

11. Damages ⇐62(3)

Water consumer who in good faith disputed water bill rendered for $129.65, and whose garden planted on one-fifth of an acre of land was partially ruined when town, owning its water system, wrongfully discontinued service to consumer *held* not required to pay bill rendered or obtain water elsewhere, in order to reduce damages recoverable from town.

12. Waters and water courses ⇐203(13)

In water consumer's action for damages sustained when consumer's water service was wrongfully disconnected, evidence to contradict consumer's testimony of value of floral and vegetable produce which were destroyed

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Judgment modified, see 55 P.(2d) 485.

because of discontinuance of service *held* improperly excluded.

13. Waters and water courses ⇐203(13)

In action by water consumer for damages due to wrongful discontinuance of water service, judgment for $450 *held* excessive, in view of evidence showing only partial destruction of consumer's floral and vegetable gardens on one-fifth acre of land and judgment was reduced to $226.50.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by E. C. Schultz against the Town of Lakeport, sometimes known as the City of Lakeport, and others. From an adverse judgment, the defendants appeal.

Affirmed on condition of remittitur.

Prior opinion, 44 P.(2d) 683.

Lovett K. Fraser, of Lakeport, for appellants.

Louis Bartlett, of San Francisco, for respondent.

PER CURIAM.

The plaintiff sued the defendants for damages alleged to have been suffered by reason of the shutting off of water from his residence. The plaintiff had judgment in the sum of $450. The defendants appealed.

The defendant town, hereinafter referred to as the defendant, operated a municipally owned system for supplying water to its inhabitants. The plaintiff devoted one-fifth of an acre of his residence lot to the cultivation of fruit, vegetables, flowers, and bulbs, and a small lawn. About April, 1927, he commenced taking water from the municipal water supply for irrigation and household uses. The minimum charge for water service was $1.50 per month. Water was supplied to the plaintiff through a meter. An ordinance in effect at the times herein mentioned provided for the shutting off of the water supply for nonpayment of the water rent. From the time the plaintiff commenced taking water until June, 1932, a period of more than five years, he received no bills for water consumed and made no tender of payment of water rents. About June 1, 1932, the city auditor reported the list of delinquent water users which showed the plaintiff in arrears for water supplied to his residence in the sum of $129.65, and the plaintiff was accordingly notified. He resisted payment of the amount claimed to be due and appeared before the town council in meeting, at which time he tendered his check in payment of his May, 1932, account. He declined to pay the balance on the ground that he was financially unable to do so, and that he did not know he was liable therefor because he thought the person from whom he purchased his residence had been paying the water bills. He also claimed that a portion of the account was barred by the statute of limitations. On July 15th the council refused the plaintiff's tender and at the same time notified him that, provided he sign an agreement to pay the arrearages in twelve equal monthly installments, and pay the first installment within ten days, service would be continued, otherwise the water would be disconnected. The plaintiff did not tender any payment pursuant to that notice and the water was disconnected on August 2, 1932. On the same day the town of Lakeport commenced an action in the justice's court to recover from the plaintiff herein the sum claimed by it amounting to about $129, for water served to his residence to June 1, 1932. On August 6th the plaintiff demanded restoration of water service and tendered to the council the amount due for service during May, June, and July, 1932, which the council refused to accept. On September 10th the plaintiff again made a tender of the amounts due for water from May to the time the water was shut off and demanded restoration of service. This tender was likewise refused.

In the action filed in the justice's court, it was ruled that the town of Lakeport failed to prove a book account, and that the claim, with the exception of the amount due for the period of two years prior to the commencement of the action, was barred by the statute of limitations. Judgment was rendered for the town for the sum of $36.69 for water furnished to Schultz at his residence during the two-year period. Schultz subsequently paid the sum of $36.69 to the council and water service at his residence was resumed on October 16, 1932.

Schultz brought this action against the town of Lakeport in September, 1933, for damages in the sum of $662.15 alleged to represent the loss or destruction of various vegetable plants, fruit vines, flower plants,

bulbs, and a lawn, by reason of the alleged wrongful discontinuance of the water service, and $26.50 for hauling of water in cans to his residence during the period when the service was disconnected. The court rendered judgment against the defendants for the sum of $450 as compensation to the plaintiff for both items of damage.

Three grounds of error in the trial court's findings in the light of the record presented are claimed. It is contended that the defendant had the right pursuant to the ordinance to discontinue the service of water for the nonpayment of the water rent. Secondly, it is contended that, if the defendant did not have such right in this case, the plaintiff should have minimized or averted the damage ensuing upon a discontinuance of the service by paying the amount due without conceding its correctness and suing to recover the overpayment, or by bringing an action for an injunction to restrain the shutting off of the water pending a determination of the amount due. Lastly, it is claimed that the amount of the damages awarded is excessive.

[1-3] The right of a water company, whether privately or publicly owned and operated, to require compliance with reasonable rules and regulations for service to customers and the payment of sums due for such service, and to provide for the discontinuance of the service for the violation thereof, has been generally recognized and may not be disputed. Sheward v. Citizens' Water Co., 90 Cal. 635, 27 P. 439; Poole v. Paris Mountain Water Co., 81 S.C. 438, 62 S.E. 874, 877, 128 Am.St. Rep. 923; Dodd v. City of Atlanta, 154 Ga. 33, 113 S.E. 166, 28 A.L.R. 465, and cases cited; Holly v. City of Neodesha, 88 Kan. 102, 127 P. 616; Girard Life Ins. Co. v. City of Philadelphia, 88 Pa. 393; 27 R.C.L., pp. 1452 et seq.; note, 28 A.L.R. 472, and cases cited. It is also a well-settled proposition that, although the consumer will not be granted relief where he has not presented a basis for a bona fide dispute of the amount claimed to be due (Sloan v. City of Cedar Rapids, 161 Iowa, 307, 142 N.W. 970; Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234), nevertheless, if the facts indicate that there is ground in good faith to dispute the correctness of the amount claimed, the consumer upon tendering the rate for the current term is entitled to have the service continued pending a settlement of the disputed overdue account. Thus in Poole v. Paris Mountain Water Co., supra, it was said: "While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term." And this exception seems generally to have been recognized. Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 92 N.E. 233, 31 L.R.A.(N.S.) 301, 19 Ann.Cas. 842; Dodd v. City of Atlanta, supra, and cases cited; City of Atlanta v. McJenkin, 163 Ga. 131, 135 S.E. 498; Wood v. Auburn, 87 Me. 287, 32 A. 906, 29 L.R.A. 376; Spaulding Mfg. Co. v. City of Grinnell, 155 Iowa, 500, 136 N.W. 649; Holly v. City of Neodesha, supra; Schoening v. Paducah Water Co., 230 Ky. 453, 19 S.W.(2d) 1073; Carter v. Suburban Water Co., 131 Md. 91, 101 A. 771, L.R.A.1918A, 764; Birmingham Water Works Co. v. Bailey, 5 Ala.App. 474, 59 So. 338; McEntee v. Kingston Water Co., 165 N.Y. 27, 58 N.E. 785; 67 C.J. 1266, 1267, § 821; 27 R.C.L. p. 1458, and cases cited.

[4] What we have to determine in this case, however, is not so much the question of the plaintiff's good faith in disputing the account rendered to him—for the answer to that inquiry must be deemed to have been resolved in the plaintiff's favor by the result of the action against him in the justice's court—but whether on the facts presented the defendant shut off the water at its peril, thus rendering itself liable for any damages that might ensue. Or, we may state the question thus: Did the plaintiff do all that he was bound to do under the particular facts, so as to be entitled to recover for the damages sustained by shutting off the water supply and the consequent destruction of his garden?

[5-7] First we may say that there is no foundation for the claim that the plaintiff should have commenced a proceeding for an injunction to restrain the threatened discontinuance of the service. The decisions herein cited in which it has been stated that an injunction is the proper remedy

to restrain the shutting off of the water in the case of a just dispute, proceed upon the theory that the action at law for damages is inadequate, and that the plaintiff will be entitled to the summary equitable remedy. The language of the cases, however, does not imply that the plaintiff may not resort to the theoretically less adequate remedy and recover damages if his conduct otherwise has not foreclosed his right thereto. The right to recover damages for the wrongful cutting off of the water supply has been recognized in the following cases: Birmingham Water Works Co. v. Keiley, 2 Ala.App. 629, 56 So. 838; Holly v. City of Neodesha, supra; Birmingham Water Works Co. v. Bailey, supra; Birmingham Water Works Co. v. Davis, 16 Ala.App. 333, 77 So. 927; Sims v. Alabama Water Co., 205 Ala. 378, 87 So. 688, 28 A. L.R. 461; and in this state in cases which are hereinafter cited. The rationale of the decided cases appears to be that the summary power of shutting off the water to coerce payment of current bills or water rent is conceded to be vested in the company furnishing such commodity so as to afford it a means of conducting its business in an orderly, efficient, and economical manner, without the expense attendant upon litigating numerous small claims as to which there can be no dispute or question of their correctness; but that such right or power is not deemed to exist concurrently with the necessity to litigate a claim disputed in good faith.

[8] On the other hand, it is undoubtedly a settled proposition that the plaintiff may not recover damages which have accrued by reason of his failure to do everything reasonable in his power to reduce the injuries which would otherwise ensue by a discontinuance of the service. In Holly v. City of Neodesha, supra, the dispute arose over the imposition of a $6 or $15 yearly rate for furnishing water to the plaintiff, a difference between the parties of but $9, and the question of the installation of a meter. The plaintiff sought damages of $7,490 and was awarded the sum of $4,550. The case was reversed on the holding of the court that reasonable diligence under the facts required the plaintiff to secure water from the city at once by paying the excess claimed and thereafter suing for the overpayment, and that the plaintiff was entitled therefore to recover only the amount he would have been obliged to pay in securing a reconnection of the service and the amount of damages, if any, probable to the time water could again have been turned on.

[9] The cases in this state have applied the rule drawn from 1 Sutherland on Damages (3d Ed.) § 88, which is that the plaintiff must employ all reasonable means to render the injury as light as possible. In the case of Mabb v. Stewart, 147 Cal. 413, 81 P. 1073, the plaintiff recovered damages in the sum of $2,875. The judgment was reversed because the record showed that the plaintiff could have obtained sufficient water from another source for an outlay of but $30. The case of Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 P. 1135, 1138, involved an excessive rate demanded by the defendant which was but a few dollars a year more than the contract rate. The plaintiff recovered a judgment of $1,176. On appeal it was stated, "By paying the excessive price without conceding its correctness, he could have saved his trees, vines, and crops, and reduced his damage to a comparatively trifling sum. This it was plainly his duty to do," and the judgment was reversed. That case was followed in Severini v. Sutter-Butte Canal Co., 59 Cal.App. 154, 210 P. 49, 50, where an even greater difference existed between the excess demanded and the damages claimed. The court there stated: "When there is such inconsequential difference between the parties the law expects the one who has great interests at stake to yield in order to save excessive damages and costs," and a judgment of nonsuit was affirmed. A failure to instruct the jury in a proper case in accord with the principle stated is ground for a reversal. Sargent v. North End Water Company, 190 Cal. 512, 213 P. 33.

[10] However, it is also a fact that the courts of this state have refused to hold the recognized principle applicable in a case where the expense to the plaintiff in procuring performance by the defendant of its duty or fulfillment of the contract from another source, is out of proportion to the damages ensuing or is otherwise unreasonable; for in such cases the plaintiff is required to do no more than can be done at reasonable expense. Such a case is Chambers v. Belmore Land, etc., Co., 33 Cal. App. 78, 164 P. 404, wherein the cost of supplying headgates which should have been constructed by the defendant was $2,000. It was held that the rule that

where the party injured could with reasonable diligence and slight expense have prevented the injury the measure of damages sustained will be limited to the reasonable cost of doing that which would have prevented the injury, did not apply to the facts there presented. A similar result was effected in the case of Joerger v. Pacific Gas & Electric Company, 207 Cal. 8, 28, 276 P. 1017. Likewise in the case of Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 491, 10 P.(2d) 780, where it was held that the application of the principle required of the plaintiff no more than slight expense in an attempt to prevent damage.

[11] It may not be supposed that the plaintiff would have been considered as having made an involuntary payment had he signed the agreement demanded and paid the first of twelve installments thereby required. The defendant itself concedes that the plaintiff could have been placed on unequal terms with it and be entitled to recover the excess had he paid the amount then claimed to be due, about $134, and secured thereby a continuance of the service. Under all of the facts presented here, however, and considering the amount of the damage which the plaintiff actually sustained, we are of the opinion that the cases cited in the next preceding paragraph control the disposition of the matter under immediate discussion, and that the plaintiff was not required to pay that comparatively substantial amount in order to prevent the destruction of a garden such as he planted on the one-fifth acre. The record does not disclose that the plaintiff could have obtained a sufficient amount of water elsewhere to irrigate his garden.

[12, 13] We are disposed to agree, however, with the defendant that the evidence does not justify the trial court's finding as to the amount of actual damage sustained by the plaintiff. The plaintiff did not seek punitive damages, and in fact the trial court expressly found that such damages were not recoverable under the facts presented. The court sustained objections to attempts of the defendant to contradict or impeach the plaintiff's testimony of the value of the floral and vegetable produce which the plaintiff would otherwise have harvested or which had been destroyed. Such evidence should have been admitted. Furthermore, the plaintiff testified that he did not sustain a total destruction of all of the vegetable and berry crops, but that he was able to harvest a portion thereof. The record indicates that it is exceedingly questionable that the plaintiff sustained damages in any such sum as that awarded him by the court from the loss of the floral, fruit, and vegetable plants which he had under cultivation on one-fifth of an acre of ground. That there was gross exaggeration in the plaintiff's testimony as to the loss sustained is indicated by the fact that he testified that the cost of replacing his grass lawn, which measured 33 by 16 feet, would be $100, while the testimony of another witness was that the replacement would involve but one day's labor and sufficient seed, at a cost of but $5. The character and amount of the produce involved, consisting of ordinary garden vegetables, berries, bulbs, and plants, not being of unusual character or extraordin ,ry value, together with the fact that a total loss from the one-fifth acre was not sustained, are physical facts which indicate that the amount of damages awarded was grossly excessive. We conclude, however, that a fair disposition of the appeal would be to order a reversal of the judgment with costs to the defendant under the rule, unless the plaintiff within thirty days from the date of the decision herein file with the clerk of this court his consent to remit all damages in excess of $226.50, upon which filing the judgment to stand affirmed, and, if thus affirmed, that neither party recover costs on appeal.

It is so ordered.

12 Cal.App.2d 757

GRONER v. KORNBLUM.

Civ. 9786.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1936.

Mortgages ⇐559(2)

In action commenced on January 13, 1934, for deficiency on trust deed note executed May 28, 1930, and due May 28, 1933, after sale under trust deed on October 17, 1933, defendant *held* not entitled to claim benefits of statute limiting deficiency judgment to difference between entire indebtedness and fair market value of property at time of sale, or statute precluding deficiency judgment, unless notice of breach and election to sell was recorded one year before date of sale (Code Civ.Proc. § 580a, as added by St.1933, p. 1672; Civ.Code, § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by R. C. Groner against Gusta Kornblum. Judgment for defendant, and plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles, for appellant.

I. B. Kornblum, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This action was brought to recover the deficiency remaining unpaid upon a note originally secured by a deed of trust after sale of the property. The trial court sustained a demurrer without leave to amend, and the appeal is taken from the judgment subsequently entered.

The note and deed of trust were executed May 28, 1930. The note became due May 28, 1933, and the sale was made on October 17, 1933, under the provisions of the deed of trust. The action was commenced January 13, 1934.

The only question presented upon the appeal is the right of the defendant to claim the benefits of sections 580a, Code of Civil Procedure, as added by St.1933, p. 1672, or 2924½, Civil Code, as added by St.1933, p. 1674. The cases of Bennett v. Superior Court, 5 Cal.App.(2d) 13, 42 P.(2d) 80, and Brown v. Ferdon (Cal.Sup.) 42 P.(2d) 80, are determinative of the rights of the parties. Upon their authority, the judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

KEY NUMBER SYSTEM

12 Cal.App.2d 103

Ex parte BELLOTTI.*

Cr. 2836.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1936.

Hearing Denied by Supreme Court March 24, 1936.

Criminal law ⇐1218

Prisoner sentenced to pay $5,000 fine for statutory felony of unauthorizedly taking motor vehicle, or to imprisonment in county jail at rate of one day for each $3 of fine not paid, could not be released after expiration of one year spent in county jail, notwithstanding statute limiting county jail sentences for misdemeanors to one year (Pen.Code, § 17; § 19a, as added by St.1933, p. 2217; St.1931, p. 2133, § 146; St.1929, p. 547, § 153½; St.1925, p. 414, § 153 (d).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

In the matter of the application of Victor Martin Bellotti for a writ of habeas corpus. From an order discharging petitioner, the People appeal.

Order reversed, and petitioner remanded to the custody of the sheriff.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles for the People.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

Victor Martin Bellotti, petitioner and respondent herein, pleading guilty to a violation of section 146 of the California Vehicle Act (St.1923, p. 564, as amended by St.1931, p. 2133), was sentenced by the

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 55 P.(2d) 864.

superior court to pay a fine of $5,000, or, defaulting in such payment, to be "punished by imprisonment in the county jail" at the rate of one day for each $3 of such fine not paid. Failing to pay the fine, petitioner went to jail, remained there one year, and then brought the within habeas corpus proceeding to procure his release. In the lower court he was successful; the writ was granted; and petitioner was ordered discharged. From that order the people appeal.

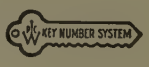
Section 146 of the California Vehicle Act at the date of petitioner's plea of guilty denounced as a felony the taking of a vehicle without the consent of the owner. The penalty for conviction of a felony was fixed by section 153(d) thereof (St. 1923, p. 565, as amended by St.1925, p. 414) as a fine of not less than $1,000 nor more than $5,000, or by imprisonment in the state penitentiary for not less than one nor more than five years, or by both such fine and imprisonment; and section 153½ of the same act (St.1923, p. 517, as added by St.1929, p. 547) provided that "a judgment that a defendant pay a fine * * * may also direct that he be imprisoned until the fine be satisfied, but the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine."

Relying upon section 17 of the Penal Code, defining a felony, and section 19a, as added by St. 1933, p. 2217, limiting a county jail sentence to one year, and reported cases such as People v. Sacramento Butchers' Ass'n, 12 Cal.App. 471, 107 P. 712, respondent contends that he may not be held in confinement in the county jail for any period longer than one year. But he loses sight of the sections of the California Vehicle Act above referred to, which specifically denominate as a felony the offense to which he pleaded guilty and fix and determine the punishment therefor. That section 17 of the Penal Code is not at variance with this conclusion is held in In re Miller, 218 Cal. 698, 24 P.(2d) 766; and the recent case of Ex parte Marquez, 45 P.(2d) 342, determines that section 19a of the Penal Code applies only to misdemeanors, and therefore cannot be relied upon by respondent here.

Under authority of the provisions of the California Vehicle Act as interpreted in the cases of People v. Acosta, 115 Cal.App. 103, 1 P.(2d) 43; In re Borah, 134 Cal. App. 14, 24 P.(2d) 841, and In re Miller, supra, it is apparent that the writ should not have been granted herein, because respondent was convicted of a felony and not a misdemeanor.

Order reversed, and petitioner remanded to the custody of the sheriff.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 186

BOYE v. BOERNER.

Civ. 10823.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1936.

1. Estates ⇐10(2)

To effect a merger, whole title, legal as well as equitable, must unite in one and same person.

2. Estates ⇐10(2)

Where beneficiary under trust deed assumed right of ownership and dominion over property described in trust deed and caused trustor's vendee to deliver a grant deed of property to another person, merger of title *held* not to result, since legal and equitable title at no time vested in one and same person.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Frank J. Boye against Gustave A. Boerner. From a judgment for plaintiff, defendant appeals.

Affirmed.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellant.

Kryne Van den Akker, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff after a trial before a court without a jury.

The conceded facts are:

Defendant purchased from John C. Boye certain real property in consideration of

which defendant executed a promissory note payable to Frank J. Boye and a trust deed upon the property to secure the payment of the note, naming Frank J. Boye as beneficiary and the Title Insurance & Trust Company as trustee. John C. Boye was at all times the real party in interest.

Thereafter, defendant sold the property subject to the trust deed to Peter Boebel and Anna K. Boebel, August 4, 1932, the Boebels being in default in payments due under the trust deed, John C. Boye caused them to execute and deliver a grant deed covering the property to Bertha A. Eschman. He stated that additional property would be given her, for the purpose of providing for his children. John C. Boye thereupon went into possession of the property, signed his name to receipts for rent, and otherwise exercised rights of ownership over the property.

May 12, 1933, the trustee caused the premises to be sold to plaintiff for the sum of $3,000 pursuant to the power of sale contained in the trust deed. This action was instituted to recover a deficiency judgment against defendant.

The single question necessary for us to determine is:

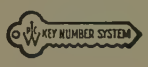
Does a merger of title result when the beneficiary under a trust deed assumes the right of ownership and dominion over the property described in the trust deed and causes the trustor's vendee to deliver a grant deed of the property to another person?

[1, 2] In order to effect a merger, the whole title, legal, as well as equitable, must unite in one and the same person. In re Estate of Washburn, 11 Cal.App. 735, 746, 106 P. 415. In the instant case, the legal title to the premises at all times subsequent to the execution of the trust deed and prior to the sale by the trustee was vested in Title Insurance & Trust Company, the trustee (Anglo-California Trust Co. v. Oakland Rys., 193 Cal. 451, 464, 225 P. 452; Sax v. Clark, 180 Cal. 287, 288, 180 P. 821), and the equitable title was vested in the defendant trustor or his vendee, Peter C. and Anna K. Boebel, or their grantee, Bertha A. Eschman. Bostwick v. McEvoy, 62 Cal. 496, 501; Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 645, 20 P. (2d) 940; Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706.

It thus appears that the legal and equitable title at no time vested in one and the same person. Hence there was not a merger of title.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 144

JAHNKE v. CITY OF LOS ANGELES et al.

Civ. 10008.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1936.

Hearing Denied by Supreme Court April 23, 1936.

1. Eminent domain ⇐277

Property owner's claim for damages from change in grade of street *held* properly presented to city clerk for filing with city council rather than board of public works.

2. Eminent domain ⇐293(3)

Property owner's allegation that she had filed her claim and demand "against" the city of Los Angeles, its council and its board of public works, could be amended to show that claim was presented "to" city clerk or city council, where claim had been presented to city clerk for filing with city council.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Magdelene Jahnke against City of Los Angeles and others. From a judgment of dismissal with prejudice, plaintiff appeals.

Reversed.

Young, Lillick, Olson, Graham & Kelly and E. L. Searle, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur W. Nordstrom and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents.

SHINN, Justice pro tem.

This action was brought by plaintiff against the city of Los Angeles to recover damages to her land resulting from certain street work done by the city to a grade which left a portion of the land well

above the street and another portion far below it.

Upon the trial, the evidence of plaintiff was directed to the question of the sufficiency of the presentation to the city of her claim for damages. The proof showed that the claim had been presented to the city clerk. The city contended that it should have been presented to the board of public works. At the close of the evidence on this point, the city's motion for judgment of dismissal with prejudice was granted, and such a judgment was entered.

[1] While the law was in an unsettled state at the time of the trial, due to certain provisions of the city charter which had not received interpretation by the Supreme Court or the District Courts of Appeal, the question which is presented in this case has been definitely answered by the Supreme Court in Douglass v. City of Los Angeles, 53 P.(2d) 353, and Cottle v. City of Los Angeles, 53 P.(2d) 361. It was not necessary that the claim be presented to the board of public works; its presentation to the city clerk for filing with the city council was sufficient.

[2] The complaint alleged that "plaintiff filed her claim and demand *against* defendants, the City of Los Angeles, the Council of the City of Los Angeles and the Board of Public Works of the City of Los Angeles." (Italics ours.) It is contended that this was not a sufficient allegation that the claim was presented *to* the city clerk or city council. The point was not raised by demurrer. At the close of the evidence and when the objection was first made to the complaint, plaintiff made a timely motion for leave to amend by substituting the word "presented" for the word "filed" and the word "to" for the word "against." This application was opposed by defendant and was denied by the court. The defect in the pleading presented a minor question. This is made evident by the statement of counsel for the city in resisting the motion that "there was a claim presented to the city clerk and subsequently transmitted to the city council." It appears that the court refused the amendment upon the ground that it would have availed plaintiff nothing, inasmuch as the proof showed that the claim had not been presented to the board of public works. Had the court been of the opinion that the claim had been properly presented, the amendment should, and no doubt would, have been allowed so as to allege the fact to be as admitted by counsel for the city. There are no other questions in the case requiring discussion.

The judgment is reversed, and plaintiff may amend her complaint if she be so advised.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 22

ARMSTRONG et al. v. BROWN, County Clerk, et al.

Civ. 5480.

District Court of Appeal, Third District, California.

Feb. 19, 1936.

Hearing Denied by Supreme Court April 16, 1936.

1. Clerks of court ⇐74

Certificate of deposit deposited with clerk of county court pursuant to stipulation for such deposit in lieu of stay bond *held* substitute for stay bond and not payment of money in lieu thereof within statute, so that clerk and surety on his bond were not liable on bond for clerk's failure to deliver certificate of deposit to county treasurer (Code Civ.Proc. §§ 573, 942, 948).

2. Clerks of court ⇐75

In action against county clerk for failure to deliver to county treasurer certificate of deposit which had been deposited with him in lieu of stay bond, evidence *held* to support judgment for defendants on ground that persons appealing from judgment had authorized clerk to retain certificate of deposit (Code Civ.Proc. §§ 573, 942, 948).

3. Attorney and client ⇐96

Attorneys of parties appealing from judgment *held* authorized to direct furnishing of stay bond without specific sanction of clients (Code Civ.Proc. §§ 573, 942, 948).

4. Attorney and client ⇐70

In absence of contrary evidence, attorney is presumed to have authorization of client to enter into stipulations incident to litigation for conducting of which he is employed.

5. Clerks of court ⇐75

In action on bond of county clerk for failure to deliver to county treasurer certifi-

cate of deposit which had been deposited with him in lieu of stay bond, admission of written stipulation reciting that certificate was to be given in lieu of undertaking prescribed, to prove waiver of bond, *held* not error (Code Civ.Proc. §§ 573, 942, 948).

6. Clerks of court ⇐75

In action on county clerk's bond for failure to deliver to county treasurer certificate of deposit which had been deposited with clerk in lieu of stay bond pursuant to stipulation pending appeal, evidence of oral instructions from attorney for appellant *held* admissible to show construction of stipulation that stay bond was to be waived by delivery of certificate of deposit (Code Civ. Proc. §§ 573, 942, 948).

7. Clerks of court ⇐75

In action on bond of county clerk for failure to deliver to county treasurer certificate of deposit which had been deposited with county clerk in lieu of stay bond, testimony that attorney for respondent in suit in which certificate was deposited had threatened to take out execution *held* properly excluded where attorney testified that he had consented to filing of certificate in lieu of stay bond (Code Civ.Proc. §§ 573, 942, 948).

8. Appeal and error ⇐1058(2)

In action on bond of county clerk for failure to deliver to county treasurer certificate of deposit which had been filed in lieu of stay bond on appeal from judgment excluding testimony of member of law firm as to whether he had been employed as attorney for appellant *held* harmless where attorney previously testified that he was member of law firm representing appellant (Code Civ.Proc. §§ 573, 942, 948).

Appeal from Superior Court, Sutter County; Raglan Tuttle, Judge.

Action by George M. Armstrong and another against Albert B. Brown, county clerk of Sutter county, and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Grove J. Fink and Garton D. Keyston, both of San Francisco, for appellants.

Loyd E. Hewitt and Lawrence Schillig, both of Yuba City, for respondents.

Mr. Justice THOMPSON, delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiffs in a suit on the official bond of the defendant Albert B. Brown, as county clerk of Sutter county, and his surety, to recover $850 for failure to deliver to the county treasurer of that county a certificate of deposit for that sum, drawn on the Decker-Jewett Bank in the clerk's name and deposited with him in lieu of a bond to stay execution of a judgment which was rendered against Armstrong in another action. The certificate was held by the clerk. It was not deposited with the county treasurer. Pending the determination of the appeal in the former action, the bank failed and the certificate was not fully paid. It is contended the clerk is liable on his official bond for dereliction of his duty under the provisions of section 573 of the Code of Civil Procedure.

Albert B. Brown was county clerk of Sutter county. The Hartford Accident & Indemnity Company became his surety on his official bond. In a suit which was previously tried in that county judgment was rendered against George M. Armstrong for $850. An appeal from that judgment was perfected. To stay the execution pending that appeal, Armstrong delivered to the county clerk a certificate of deposit on the Decker-Jewett Bank for $850, drawn in the name of the "County Clerk of Sutter County." This certificate was given to the clerk pursuant to a written stipulation of attorneys according to the provisions of section 948 of the Code of Civil Procedure. The stipulation contained the following language: "In lieu of the undertaking prescribed * * * the defendant may deposit in this court the sum of $850.00, * * * and that said deposit may be in the form of a certificate of deposit payable to the clerk of this court." The clerk testified that "Mr. Coats, attorney for Mr. Armstrong, instructed me explicitly to hold the certificate of deposit, and not to turn it in to the County Treasurer or cash it." Mr. Harter, who was the attorney for the respondent in the former appealed case, and who signed the written stipulation regarding the stay bond, testified that Mr. Coats "told me they were going to take an appeal from that judgment, and that he would appreciate it if I would consent to filing a certificate of deposit, which might remain with the clerk, so that the money could remain on deposit with the bank where it would draw interest in the savings account, as a favor to himself and Mr. Armstrong, and I consented to this ar-

rangement and signed the stipulation." It is true that the certificate includes the language, "No interest payable before or after maturity." We may assume, however, the parties did not know the certificate would bear no interest. In conformity with the written stipulation and the oral instructions above related, the certificate of deposit was given to the clerk and retained by him. The judgment in the former suit was affirmed on appeal, and Armstrong thereafter satisfied the judgment.

Prior to the termination of the former appeal the Decker-Jewett Bank failed and it was placed in the custody of a receiver. At the request of the attorneys for Mr. Armstrong the county clerk filed a claim for said sum of $850 represented by the certificate of deposit with the receiver of the bank. The clerk testified that it was filed in his name at their request and "as a matter of accommodation" to Mr. Armstrong. Two dividends were subsequently paid on the claim by the bank. The first dividend was promptly paid to and accepted by one of the attorneys for Armstrong. The second dividend was offered to the attorney, but he refused to accept it. This suit was then commenced. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendants on all the material issues. Judgment was rendered to the effect that the plaintiffs take nothing by this action. From that judgment, this appeal was perfected.

It is contended the findings and judgment are not supported by the evidence for the reason that the clerk is liable on his official bond for the loss sustained by the plaintiffs for failure to comply with the law and deposit the certificate with the county treasurer. Errors in the rulings of the court with respect to the admission of evidence are also assigned.

[1] We are of the opinion the transaction which is involved on this appeal did not constitute a payment or deposit of money into court in lieu of a bond to stay execution and that the clerk was not guilty of any violation of law or dereliction of his official duty in failing to deliver the certificate of deposit to the county treasurer. Section 573 of the Code of Civil Procedure, as it existed at the time of that transaction, provided that: "Whenever money is paid into or deposited in court, the same must be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. * * * For the safekeeping of the money deposited with him the treasurer is liable on his official bond."

The bond staying execution to satisfy a judgment pending an appeal therefrom, as provided by section 942 of the Code of Civil Procedure, may be waived by consent of the respondent, or it may be supplied by depositing in the trial court the amount in cash of the judgment appealed from. Section 948 of the Code of Civil Procedure provides in that regard: "In all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

In the present case, the language of the written stipulation with respect to the furnishing of the certificate of deposit constitutes a waiver on the part of the respondent in the former action of the necessity of filing either a bond or cash deposited in lieu thereof in the form provided by law. In effect the stipulation may be reasonably construed to mean that the respondent consented that in lieu of a stay bond the appellant might deliver to the clerk a certificate of deposit for the sum of $850 to be held by the clerk to guarantee the payment of the judgment in the event that the judgment was affirmed on appeal. The judgment was affirmed, and it was subsequently satisfied in full. The security then became functus officio, and the clerk offered to return the certificate to the appellant.

The written stipulation specifically provides the exact form in which the security in lieu of a stay bond shall be provided. It reads as follows: "* * * In lieu of the undertaking prescribed * * * the defendant may deposit in this court the sum of $850.00 * * * in the form of a certificate of deposit payable to the clerk of this court." The certificate of deposit was not a payment of money in lieu of the stay bond. No money was delivered to the clerk of the court. The certificate did not represent public money belonging to the county of Sutter. It was a private bond to

secure the payment to the respondent in that suit of the amount of the judgment in the event it was affirmed on appeal. The language indicates that the instrument "in the form of a certificate of deposit" was to take the place of the stay bond provided by law. This construction of the language is confirmed by the oral statements of the attorneys for both parties to the litigation. They requested the clerk to hold the certificate in his possession without cashing it. This construction was ratified by accepting the first payment made by the bank on the claim which was filed with the receiver of the bank. Under such circumstances the clerk retained possession of the certificate exactly as the written stipulation assumes that he would do, and he is therefore not guilty of any dereliction of official duty in failing to deliver it to the county treasurer.

[2-4] The appellants contend that their attorneys were not authorized by them to instruct the clerk to hold the certificate of deposit in his possession. The evidence does not sustain that contention. The certificate was drawn upon the bank by the wife of Mr. Armstrong. She furnished the cash for that purpose. Mr. Armstrong was not then present. She was not a witness in this case. All that Mr. Armstrong testified to in that regard is that, "I did not authorize Judge Coats to make an agreement that money should stay in the bank so I would get interest on the money during the pendency of the appeal. * * * I don't think I ever told Mr. Coats not to have Mr. Brown keep that certificate of deposit." Upon this record, in support of the findings and judgment, we must assume that Mrs. Armstrong did authorize their attorneys to so instruct the clerk. Moreover, the furnishing of the stay bond was a mere matter of procedure incident to the trial of the case which the attorneys were authorized to direct without the specific sanction of their clients. In the absence of evidence to the contrary, an attorney is presumed to have the authorization of his client to enter into stipulations incident to the litigation for the conducting of which he is employed. Regarding the authority of an attorney to bind his client by stipulation, it is said in 25 Ruling Case Law, p. 1097, § 4: "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client."

[5] It was not error for the court to admit in evidence over the objection of the appellant the written stipulation waiving the bond. Section 948 of the Code of Civil Procedure authorizes the waiver of the bond by written stipulation. The stipulation was competent to prove the waiver of the bond. The stipulation recites that the certificate was to be given "in lieu of the undertaking prescribed."

[6] Evidence of the oral instructions from the attorney for appellant was competent to show their construction of the language of the written stipulation to the effect that the bond was to be waived by the delivery to the clerk of security "in the form of a certificate of deposit," without the depositing of cash in lieu of the bond. Mr. Harter testified to that fact without objection.

[7] It was not error for the court to sustain an objection to the question propounded on cross-examination to Mr. Harter, the attorney for the respondent in the former suit, who signed the stipulation waiving the stay bond, as follows: "You threatened to take out an execution if you won your case in the trial court?" He had previously testified that Mr. Coats, one of Armstrong's attorneys, came to him and said, "They were going to take an appeal from that judgment, and that he would appreciate it if I would consent to filing a certificate of deposit, which might remain with the clerk, so that the money could remain on deposit with the bank where it would draw interest in the savings account, as a favor to himself and Mr. Armstrong, and I consented to this arrangement and signed the stipulation." It was therefore immaterial whether he had previously threatened to take out an execution to satisfy the judgment. The consent of the respondent to permit the delivery of the certificate of deposit to be held by the clerk was evidently deemed to be adequate security for the payment of the judgment. The

exclusion of the answer as to whether the attorney had previously threatened to take out an execution was harmless.

[8] It was harmless for the court to sustain an objection to the question asked of Mr. Weis, who was a member of the law firm of Rich, Weis, Coats & Carlin, as follows: "Did Mr. Armstrong ever employ you as his attorney?" The witness had previously testified that he was a member of that law firm. He further said, "Our firm was representing George M. Armstrong in that case." It further appears they were the attorneys of record in that case. There is no evidence to the contrary. There is no question regarding that fact.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



12 Cal.App.2d 73

TUX GINGER ALE CO., Limited, et al. v. DAVIS, Chief of Police, et al.

Civ. 10825.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1936.

Intoxicating liquors ⇐122

Beverages which were combination of wine, alcohol, flavoring, and water, with added alcohol being three times as much as wine could not be classified by state board of equalization as "wines" so as to permit their sale at establishments holding "beer and wine" licenses (St.1935, p. 1123, § 2; Gen.Laws Supp.1933, Act 3774, § 4 (b); Const. art. 20, § 22, as amended in 1934).

"Wine" is a fermented liquor; the fermented juice of the grape, produced by fermentation; a spirituous liquor resulting from the fermentation of grape juice; or a preparation of other fruit or vegetables by fermentation.

[Ed. Note.—For other definitions of "Wine," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Tux Ginger Ale Company, Limited, and others against James E. Davis, chief of police of the city of Los Angeles, and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Louis Feinstein, Philip N. Krasne, and Leon Kaplan, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Newton J. Kendall, Bourke Jones, and John L. Bland, Deputy City Attys., all of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiffs, manufacturers and vendors of various alcoholic concoctions denominated "Tux Whiskey Stinger," "Kicks Highball," "Silver Punch," and the like, unsuccessfully prosecuted this action against the city of Los Angeles, its chief of police and city attorney to restrain them from making threatened arrests of plaintiffs for alleged violations of the State Liquor Control Act in selling said beverages under the guise of "wine." As the law stood at the time the action was brought, it prohibited the consumption on the premises where sold of all alcoholic beverages except wines and beer. To meet that situation plaintiffs had secured from the state board of equalization permission in writing approving the sale of the above-mentioned products in establishments holding "On Sale" licenses for beer and wine, apparently upon the theory on the part of the board that they were properly classifiable as wines.

Since the appeal herein was taken, a constitutional amendment of November 6, 1934 (first numbered section 22, art. 20), permitting the sale and consumption on the premises of "all intoxicating liquors," has rendered moot the main questions involved, leaving for consideration only the point as to whether the beverages named may be classified by the state board of equalization as "wines," thus permitting their sale at establishments holding a "beer and wine" license, or whether they may be sold only at establishments holding a license for the sale of intoxicating liquors.

Wine is defined by the Liquor Control Act (Stats.1935, p. 1123, § 2, c. 330) as "the product obtained by the fermentation of grapes or other agricultural products containing natural or added sugar or any such alcoholic beverage fortified with grape

brandy and containing not more than twenty-four per cent of alcohol by volume." The act as it read before the amendments of 1935 defined wine as "any alcoholic beverage obtained by the fermentation of the natural content of fruits or other agricultural products containing sugar." Deering's Codes, 1933 Supp., Act 3774, § 4(b). A general definition of the term, gleaned from a survey of many discussions, is given thus in 40 Cyc. at page 2121: "A fermented liquor; the fermented juice of the grape, produced by fermentation; a spirituous liquor resulting from the fermentation of grape juice; or a preparation of other fruit or vegetables by fermentation."

Neither by the terms of the Liquor Control Act nor by legal definition, nor by common understanding of the word, can the beverages in question here be fairly or properly designated as wines. By the admission of the pleadings the liquors sought to be sold as "wines" are a combination of wine, alcohol, flavoring, and water, with the added alcohol being three times as much as the wine. The court was correct in its holding that the various mixtures were not wines, and the dictum of the state board of equalization to the effect that they were has no effect. The board was authorized by law to make rules and regulations "pursuant to the provisions of this [liquor control] act." The act itself defines what constitutes wine, and a ruling contrary to the terms thereof is ineffective.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 98

ISAACS et al. v. JONES et al. (ROSS, Intervener).

Civ. 10010.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1936.

Hearing Denied by Supreme Court April 23, 1936.

1. Appeal and error ⇐766

Failure of appellant's brief containing headings "Statement of Facts," "Summary of Pleadings," and "Argument" to present each point separately under an appropriate heading, showing nature of question to be presented or point to be made, would justify a dismissal of the appeal (Rules of the Supreme Court and District Courts of Appeal, rule 8, §§ 2, 4).

2. Execution ⇐268

Where deed of trust was executed and recorded prior to levy of an attachment and consequently had priority over attachment, purchaser at execution sale, having acquired no greater rights than judgment debtor, was not entitled, as against beneficiary under deed of trust and purchaser at foreclosure sale, to rents collected by receiver prior to foreclosure sale but after execution sale and during redemption period (Code Civ.Proc. § 707).

3. Mortgages ⇐199(2)

Provisions in deed of trust purporting to appoint third party as attorney in fact of trustors to collect rents, which provisions were stated to have been made as consideration for payment of note and were to remain in effect until note was paid in full, *held* intended to make rents accruing after default additional security for note.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Charles Isaacs and another against H. M. Jones and others, in which J. Edgar Ross intervened. From a judgment for plaintiffs, intervener appeals.

Affirmed.

J. Edgar Ross, in pro. per.

Arthur T. Stollmack and Samuel V. Goldfarb, both of Los Angeles, for respondents.

SPENCE, Justice.

The intervener, J. Edgar Ross, has appealed upon the judgment roll from a judgment awarding to plaintiff Charles Isaacs the sum of $707.01, which was the balance deposited with the clerk of the court by the receiver appointed in the above-entitled action.

[1] Appellant's brief contains the following headings: "Statement of Facts," "Summary of Pleadings," and "Argument." It fails to present "each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." Section 2, rule VIII of the Rules of the Supreme Court and District Courts of Appeal. Such failure would justify a dismissal of the appeal

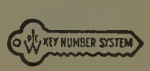
Section 4 of said rule VIII; Cunnyngham v. Mason-McDuffie Co., Inc., 218 Cal. 196, 22 P.(2d) 515, and cases cited.

[2] We have nevertheless examined the briefs and find no merit in appellant's points. The sum awarded to respondent Charles Isaacs represented the balance of rents collected by the receiver who was appointed in this action which was brought to obtain specific performance of the provisions of a deed of trust relating to such rents. Mines v. Superior Court, 216 Cal. 776, 16 P.(2d) 732. Said respondent was the beneficiary under the deed of trust and the purchaser at the foreclosure sale. Appellant was the purchaser upon an execution sale in another action. Said rents were collected by the receiver prior to the foreclosure sale, but after the execution sale and during the period allowed for redemption therefrom. Appellant claims he was entitled to said rents under the provisions of section 707 of the Code of Civil Procedure. But the deed of trust was executed and recorded prior to the levy of attachment in the other action and had priority over the attachment. Appellant, as purchaser at the execution sale, acquired no greater rights than those of the judgment debtor, and we therefore conclude that the trial court properly awarded the balance of said rents to respondent Charles Isaacs.

[3] Appellant questions the form of the deed of trust, and apparently claims that rents were not made security for the payment of the note. This claim may not be sustained. The deed of trust was somewhat unusual in form, and it did purport to appoint a third party as attorney in fact of the trustors to collect the rents. These provisions were expressly made "as a part of the consideration for the payment of the sum evidenced by the note herein described and for the purpose of carrying into full force and effect all the terms, provisions and conditions of this indenture contained." The power was declared to be irrevocable and was to remain in effect "until all of the note herein described shall have been fully paid and liquidated." The power was not to be exercised until default. It was to be binding on the trustors' successors in interest, and was made "collateral and in furtherance of the power granted" to the trustee. Apparently the person appointed did not attempt to act under the power granted, but this action was brought and the receiver was appointed. Appellant argues that "the power of attorney was never intended by its makers to convey any title," but, disregarding the form and considering the substance of these provisions of the deed of trust, we believe it entirely clear that the rents accruing after default were intended as additional security for the note secured by the deed of trust.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



McNENY v. TOUCHSTONE et al. *

Civ. 10004.

District Court of Appeal, First District, Division 2, California.

Feb. 29, 1936.

Hearing Granted by Supreme Court March 30, 1936.

Partnership ⇐277

Where dissolution agreement completely wound up partnership affairs, partnership did not continue in existence thereafter by force of statute providing that partnership is not terminated on dissolution (Civ.Code, § 2424).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 54 P.(2d) 41.

James E. Neville, of Los Angeles, for appellant Blake Touchstone.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant Weatherford W. Touchstone.

Shaw & Bailey and Charles D. Shaw, all of Los Angeles, for respondent.

PER CURIAM.

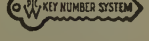
The main point made in respondent's petition for rehearing is that the decision herein is in conflict with Citizens' National Trust & Savings Bank v. W. L. McNeny (Cal.App.) 52 P.(2d) 492. There is an apparent conflict between the last paragraph of the opinion in that case and the last paragraph of the opinion herein, but we adhere to the views heretofore express-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 60 P.2d 986.

ed. The agreement here not only dissolved the partnership, but it completely wound up the partnership business and the partnership affairs. There was no longer any partnership property, nor did the parties have any further rights as partners. All of their rights as partners had ceased when the agreement was executed and their rights thereafter were purely contractual rights held by them as individuals and not as partners by virtue of the terms of the agreement. As we are of the opinion that the "partnership affairs" had been completely wound up by said agreement, we conclude that the provisions of section 2424 of the Civil Code did not result in the continued existence of the partnership after the execution of the agreement.

The petition for rehearing is denied.



12 Cal.App.2d 100

LORAH v. BISCAILUZ et al.

Civ. 10698.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1936.

1. Officers ⇐118

Head of law enforcement department is not responsible for acts of subordinates unless he has directed such acts to be done, or has personally co-operated in offense.

2. Sheriffs and constables ⇐100

Under county charter and civil service regulations, county sheriff *held* not liable for acts of deputies which he had not directed or in which he had not personally co-operated.

3. Sheriffs and constables ⇐157(3)

Sureties on sheriff's bond *held* not liable for damages for acts of deputies for which sheriff was not personally liable, notwithstanding express provisions in bond covering acts of deputies.

4. Sheriffs and constables ⇐154

Right to sue on sheriff's bond is derived from express statutory authority only (Pol. Code, § 961).

5. Sheriffs and constables ⇐157(3)

Under statute authorizing suit on sheriff's bond by third persons for wrongful act or default of officer in official capacity, third person *held* not entitled to maintain suit on sheriff's bond for acts or defaults of deputies (Pol.Code, § 961).

6. Sheriffs and constables ⇐157(3)

Bond wherein surety had agreed to assume liability for acts of sheriff's deputies *held* executed without consideration as to such provision so that such provision of bond was mere surplusage (Pol.Code, § 961).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Robert Kenny, Judge.

Action by Anna Lorah against Eugene Warren Biscailuz and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard and J. F. Moroney, Deputies Co. Counsel, and James H. Sims, all of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiff, alleging physical injury and false imprisonment when she was arrested upon a felony charge, brought suit for damages against the arresting officer, who was a deputy sheriff of Los Angeles county, and against the sheriff of said county and the latter's official bondsmen. A general demurrer on behalf of the sheriff and his bondsmen was sustained without leave to amend, and from the resulting judgment plaintiff appeals.

[1, 2] While the general rule is that a sheriff is liable for the torts of his deputies committed in the performance of the latters' official acts or acts colore officii (Abbott v. Cooper, 218 Cal. 425, 23 P.(2d) 1027; Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St.Rep. 123), upon the theory that the deputy, appointed by and answerable to the sheriff, is his representative, this rule has been held inapplicable in the case of a chief of police whose appointees are selected from a restricted list, who are under civil service regulations and who are in general governed by the provisions of a city charter. Michel v. Smith, 188 Cal. 199, 205 P. 113. It is difficult to find points of vital dissimilarity between the case of the chief of police and police officers working under a city charter in Michel v. Smith, supra, and

the case of the sheriff and deputy sheriff under the county charter and civil service regulations in the instant case. There it is held, correctly we believe, that the head of the department of law enforcement is not responsible for the acts of his subordinates "unless he has directed such acts to be done, or has personally cooperated in the offense." The same rule applied here would relieve the sheriff of liability in this case.

[3-6] The sheriff not being liable personally, his sureties are likewise not answerable; not even in the case of defendant National Surety Company, whose bond by its express terms covers the acts of the sheriff's deputies. The right of third persons to sue on such bonds is granted by section 961 of the Political Code for "the wrongful act or default of such officer in his official capacity." This right to sue on such a bond is derived from express statutory authority alone, and the section granting the right does not provide for suit for acts or defaults of deputies. Plaintiff, therefore, a stranger to the bond, may not maintain suit thereon. Sunter v. Fraser, 194 Cal. 337, 228 P. 660. Furthermore, inasmuch as the sheriff is not in this case liable as a matter of law for the torts of his deputies, a bond in which the surety has agreed to assume such liability must be held to have been executed as to such provision without consideration, and the provisions of the bond with relation thereto are mere surplusage.

Judgment affirmed.

I concur: CRAIL, P. J.

I dissent: WOOD, J.



12 Cal.App.2d 129

UNGER v. GOLDMAN et al.

Civ. 9833.

District Court of Appeal, Second District. Division 2, California.

Feb. 25, 1936.

Rehearing Denied March 27, 1936.

Hearing Denied by Supreme Court April 23, 1936.

1. Appeal and error ⇐1010(1)

Finding of trial court that secured note, given by defendant in consideration of dismissal of action against him, was delivered nearly three months before date of letter written by defendant to plaintiff, was binding upon District Court of Appeal, where it was supported by substantial evidence and sustained conclusion that plaintiff's acceptance of note did not make it subject to tenus of letter.

2. Mortgages ⇐218

In absence of allegation of facts showing that security behind note had been exhausted or had become valueless, action could not be brought upon note.

3. Appeal and error ⇐959(1)
Pleading ⇐236(1)

Allowance of amendments to pleadings is always within court's discretion, and it will be presumed that discretion was exercised in furtherance of justice, and reversal will not be ordered except for a plain abuse of discretion.

4. Pleading ⇐267

Refusal to allow amendment of cross-complaint asking judgment against plaintiff upon series of notes, by alleging that security for notes had become valueless, *held* not error, where matters sought to be alleged by amendment were available to cross-complainants from their own knowledge and by way of public record.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Dora Unger against H. A. Goldman and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

Thos. C. Ridgway and H. A. Goldman, both of Los Angeles, for appellants.

Max Lewis, A. Arnold Klein, and Laurence M. Weinberg, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

Involved financial transactions between plaintiff and her husband, defendant Goldman, and his affiliated finance corporations, and a construction company and its numerous creditors brought about a situation early in the year 1928 wherein the various parties named were in litigation in two separate superior court suits. One of these was called for trial March 28, 1928. On that date, it was testified in the within case in plaintiff's behalf, defendant Goldman promised to give the Ungers his secured

note for $10,000 in consideration of their dismissal of the pending action against him. The dismissal was signed and filed the same day. The note was not made out until June 14, 1928, and was delivered to the Ungers, so plaintiff testified, about one month later. Originally the note was secured by a mortgage, duly recorded July 5, 1928, but the Ungers on the very date the note and mortgage bear, June 14, 1928, had executed a release of the mortgage. This was done, plaintiff testified, without consideration and in the mistaken belief that she was signing a quitclaim deed to another piece of property, and the trial court herein made a finding to that effect. In any event, the security represented by the mortgage had vanished before the date of the trial of the within action, by reason of the foreclosure of a prior lien upon the mortgaged premises. Plaintiff's husband had died prior to filing suit herein, she had succeeded to his interest in the $10,000 note and mortgage, and as the sole owner thereof sued defendant Goldman upon the instrument, joining the corporate defendant as the owner of some interest in the mortgaged premises.

Upon trial findings were all in plaintiff's favor; the court rendering a personal judgment againts defendant Goldman for the unpaid principal balance of the note, interest and costs. Goldman as defendant and cross-complainant, together with cross-complainant Angel City Investment Company, appeals.

[1] Appellant Goldman's principal contention has to do with a letter dated September 10, 1928, signed by himself, addressed to the then attorney for the Ungers and bearing the signed acceptance of the Ungers. This letter purported to deliver to the latter's attorney the $10,000 note herein involved, together with the mortgage securing the same and the mortgage release above referred to, and, after imposing certain other conditions, specifically provided that Goldman "does not acknowledge any indebtedness or obligation" to the Ungers, and that "in accepting this offer it is understood that [the Ungers] do not claim any obligation against the said * * * Goldman." It is Goldman's contention that the note and mortgage in question accompanied by the above letter were not delivered to the Ungers until after September 10, 1928, and that the acceptance of the same by the payees made the note subject to the terms mentioned in the letter; that the liability of the maker of the note was measured by the restrictions in the concomitant writing.

The point might be sound as a matter of law except for the fact that the court in this case found that the note was actually delivered June 14, nearly three months before the date of the letter upon which appellant relies. This finding is supported by substantial evidence, and we may not disturb it. We must conclude that the trial court determined that the letter of September 10 did not accompany the delivery of the note of June 14, which determination is fortified by ample evidentiary support. Therefore cases such as Symonds v. Sherman, 219 Cal. 249, 26 P.(2d) 293, relied upon by appellants as stating the doctrine of conditions or restrictions upon delivery of instruments executed as part of the same transaction, have no applicability to the situation found by the court in this case.

Appellants also urge, in the face of the court's finding (amply supported by evidence), that the dismissal of the pending superior court action was the consideration for the execution of the note, that there was no actual consideration. This argument is based upon alleged admissions made by the Ungers in other matters that they had in fact had no valid claim against appellant Goldman in the suit which was dismissed. This again is simply a case of conflicting evidence, resolved by the court in favor of respondent.

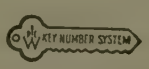
[2] The trial court had before it for consideration not only the complaint and answer but also a cross-complaint by which appellants herein asked judgment against respondent upon a series of promissory notes which, it was alleged, she had executed and delivered to cross-complainants' assignor. It developed upon the hearing upon the cross-complaint that the notes had been secured by deeds of trust. There were no facts alleged in the cross-complaint showing that the security had been exhausted or that it had become valueless. Without a showing of either of these alternatives, a cause of action could not be maintained upon the secured notes. Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940. Objection to the introduction of evidence was properly sustained by the court. Appellants then asked leave to amend by alleging that the security for the notes had become valueless, which was denied. This ruling is cited as an abuse of discretion.

[3, 4] The allowance of amendments to pleadings is always within the court's discretion, and it will be presumed that the discretion was exercised in the furtherance of justice. Trower v. City and County of San Francisco, 157 Cal. 762, 109 P. 617. Reversal will not be ordered except for a plain abuse of discretion; and it has been held that, where the subject-matter of the amendment could and should have been known before trial to the party seeking leave to amend, no abuse of discretion is shown by the court's refusal to allow the amendment. Schalich v. Bell, 173 Cal. 773, 161 P. 983. Here the matters sought to be alleged by way of amendment were available to appellants not only from their own knowledge but by way of public record. We must hold that there has been no showing of abuse of discretion such as to compel an appellate court to order a reversal.

Thirty-eight separate specifications of error relating to introduction of evidence also are listed by appellants. It may be true that the trial court was not without error in the hearing of this lengthy case, but the matters complained of are for the most part inconsequential and did not deprive appellants of the fair and impartial trial and decision to which they were entitled. The case in essence is one of conflicting evidence; and discovering, as we do, substantial evidentiary support for the findings and judgment of the trial court, we may not disturb its conclusions.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 116

HOOKER et al. v. AMERICAN INDEMNITY CO.

Civ. 10443.

District Court of Appeal, Second District, Division 1, California.

Feb. 25, 1936.

Rehearing Denied March 23, 1936.

Hearing Denied by Supreme Court April 23, 1936.

1. Insurance ⇐141(2)

Where insurer delivered public liability policy to insurance broker, who made separate arrangements with insured for deferred payment of premium, fact that premium was unpaid by insured to broker at time of accident or unpaid by broker to insurer *held* not to affect enforcement of policy against insurer in absence of evidence of contrary arrangement.

2. Insurance ⇐229(3)

Broker who is engaged to procure insurance ordinarily has no authority to cancel such insurance (Pol.Code, § 633a).

3. Insurance ⇐229(3)

In determining whether insurance broker in possession of public liability policy was ostensible agent of insured for purpose of cancellation of policy, statute defining ostensible agency must be read with statute providing that agency is terminated by incapacity of agent to act as such (Civ.Code, §§ 2300, 2355, subd. 5; Pol.Code, § 633a).

4. Insurance ⇐665(1)

Evidence supported finding that insurance broker in possession of public liability policy, claimed to have been canceled prior to accident, was instructed by insured not to cancel policy and did not show that broker was ostensible agent of insured for that purpose (Civ.Code, §§ 2300, 2355, subd. 5; Pol. Code, § 633a).

5. Insurance ⇐669(3)

In action on public liability policy in possession of insurance broker at time of accident, instruction on ostensible agency *held* properly refused where there was no evidence that broker was ostensible agent of insured for purpose of cancellation of policy (Civ.Code, §§ 2300, 2355, subd. 5; Pol.Code, § 633a).

6. Stipulations ⇐18(6)

In action on public liability policy, objection to question as to whether insurance broker who procured such policy had placed other insurance for insurer *held* properly sustained where stipulation admitting authority of party procuring insurance to buy insurance was accepted.

7. Insurance ⇐668(3)

Whether insured who continued to pay premiums after notification by insurance broker that public liability policy had been canceled and another issued which had not been in effect at time of accident thereby ratified act of broker in canceling original policy *held* for jury.

8. Insurance ⇐234

Where public liability policy provided that it could not be canceled by agreement between insurer and insured after insured had become responsible for loss, act of insurance broker in canceling policy could not be ratified by insured subsequent to accident, since

rights of heirs of party killed in accident had already intervened (Civ.Code, § 2313).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Emily Jane Hooker and others, as heirs at law of T. O. Hooker, deceased, against the American Indemnity Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Hulen C. Callaway, of Los Angeles, for appellant.

Ezra Neff, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Plaintiffs are the heirs at law of T. O. Hooker, who, in the forenoon of August 22, 1933, was killed by a truck operated and owned by Hawkins Company, Limited, a trucking concern (hereinafter referred to as insured). In an action for wrongful death brought by plaintiffs against insured, they recovered a judgment of $6,720. This action by plaintiffs is predicated on said judgment and is brought against the American Indemnity Company, appellant herein, the alleged insurance carrier of insured, since the appellant refused to pay the judgment recovered against insured or any part thereof. Appellant claims that it carried no insurance covering the truck in question at the time of the accident.

Insured did its insurance business through a regularly licensed insurance broker, one A. E. Nicholls (hereinafter for convenience referred to as broker). On August 9, 1933, pursuant to the request of insured, broker obtained for it a policy issued by appellant insuring it against public liability for personal injuries with limits of $5,000 for injuries or death to one person, and $10,000 for injuries or death to two or more. This insurance became effective as of that date, to wit, August 9, 1933. The policy of insurance was delivered by appellant to the broker and kept by the broker in his own possession.

On August 15, 1933, broker wrote to insured advising it that coverage for public liability had been effected, and informing insured that a down payment of $67.02 was required. In the letter the broker requested the insured, pursuant to what was apparently their previous understanding, for an order on Wood Rock & Sand Company (for whom the insured was doing hauling) for said payment. The balance of the premium was to be financed by the execution of certain agreements which were inclosed in said letter.

On or about August 18, 1933, broker had a conversation with the insured, in which, according to the broker, the insured told him that its trucks were not working and that it would like to get some form of insurance which would carry no premium while the trucks were idle, but which would protect it when they were in work. The broker, according to his testimony, informed insured that this could not be arranged, but that the present insurance could be canceled and new insurance written when the trucks were again put to work. The testimony of the insured on this point of cancellation, which is a decisive one in the case, was that he told the broker: "I must have insurance, Mr. Nicholls, regardless of the cost of premium, so I will have to continue the policy as it is then. * * *" Broker, nevertheless, according to his testimony, did on August 19, 1933, return the policy in question to appellant and requested its cancellation, and appellant did on August 21, 1933, cancel the policy on its books. In the forenoon of August 22, 1933, the accident which resulted in the death of T. O. Hooker occurred. On the afternoon of the same day, the insured called at the office of broker, made a payment of $20 and signed an order on Wood Rock & Sand Company for a balance, obtaining a receipt signed by an employee of broker. Upon his return to his office, broker learned that the insured had made the foregoing payment, and ordered reissued a policy from appellant. A policy was reissued, effective as of noon, August 22, 1933.

On August 23, 1933, broker heard of the accident, whereupon he immediately addressed a letter to the insured, advising insured that he had canceled the first policy pursuant to the conversation he had with insured on August 18, 1933. In said letter broker advised insured that he had heard of the cash payment made and the order left with his employee, and had assumed that the insured had put his trucks to work again, as a result of which he requested insurance company to reissue the policy, but that it had been reissued as of noon, August 22, 1933, and that insured had no coverage on his trucks at the time the accident happened. As has been pointed out, insured denied that he authorized any cancellation in said conversation or at

all. A jury, before which the case was tried, brought in a verdict against the appellant for $5,000. Judgment was entered thereon, and this appeal is from that judgment.

The immediate and decisive question is whether the policy originally issued on August 9, 1933, was in full force and effect in the forenoon of August 22, 1933. The answer to this question is dependent on the authority of the broker to cancel it.

[1] At the outset, it should be made clear that appellant wrote the insurance and delivered the policy to the broker, who ordered the policy on his credit, making separate arrangements with the insured for deferred payment of premium. There is no evidence that appellant looked to any one but the broker for prompt payment of the premiums of said policy. Appellant had no direct interest in, and was in no way affected by, any arrangements made between the insured and the broker for payment of premium. The policy took effect from its date of issuance and delivery, and unless there was an arrangement to the contrary, the fact that the premium on the policy was unpaid by the insured to the broker at the time of the accident, or unpaid by the broker to appellant, does not in any manner affect the enforcement of the terms of the insurance policy against appellant. Union Ins. Co. v. American Fire Ins. Co., 107 Cal. 327, 40 P. 431, 28 L.R.A. 692, 48 Am.St.Rep. 140; Anderson v. Mutual Life Ins. Co., 164 Cal. 712, 716, 130 P. 726, Ann.Cas.1914B, 903; Bloom v. Pacific Mutual Life Ins. Co., 85 Cal.App. 419, 259 P. 496. Indeed, neither the broker nor appellant contends that the policy was canceled for nonpayment of premium. The sole point with regard to cancellation is that it was authorized by the insured.

[2] Generally speaking, a broker who is engaged to procure insurance has no authority to cancel such insurance. Section 633a of the Political Code defines a broker as one who "for compensation and on behalf of another party solicits, negotiates, or effects contracts of surety, indemnity, or insurance other than life." It has been held by the courts of this state that "An agent authorized to procure insurance is not thereby made the agent of the insured to cancel the policy." Quong Tue Sing v. Anglo-Nevada Assurance Corporation, 86 Cal. 566, 25 P. 58, 60, 10 L.R.A. 144; Stevenson v. Sun Ins. Office, 17 Cal.App. 280, 119 P. 529; Lauman v. Springfield, etc., Ins. Co., 184 Cal. 650, 195 P. 50; Cronenwett v. Iowa Underwriters, etc., Ins. Co., 44 Cal.App. 571, 576, 186 P. 824.

[3-5] Appellant asserts that because the broker had in his possession the insurance policy, he was, so far as appellant was concerned, the ostensible agent of the insured for the purpose of having the policy canceled. Section 2300 of the Civil Code defines ostensible agency as: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Subdivision 5 of section 2355 of the Civil Code provides that "An agency is terminated" by "the incapacity of the agent to act as such." These two sections must be read together and applied to the facts in the case at bar. In the instant case, the jury impliedly found as a fact, from conflicting evidence, that the broker was not authorized to cancel the policy and that he was instructed to keep it alive. In addition, there was ample credible evidence from which the jury was justified in concluding, as the members thereof undoubtedly did, that the policy was not in fact surrendered by the broker to appellant until after the broker had received information about the accident. In this regard the testimony showed that when the insured, after the accident, made a partial cash payment upon the policy and delivered its order for additional money to apply on the premium, that the insured received a receipt therefor, in which the specific policy was mentioned, and that in order to identify this policy the books of the broker were referred to. It was further developed that it was the custom of the broker to note on his books the cancellation of policies on the date of their cancellation, and that at the time insured received his receipt there was no such evidence of cancellation on the broker's books. Other than the mere fact that the broker had possession of the insurance policy, there was no suggestion of any kind in the evidence to indicate an ostensible agency. The possession of the broker, standing alone, cannot be considered evidence of ostensible agency, since the broker's possession was that of the insured, and as between appellant and the insured, the contract of insurance was valid and in force, irrespective of whether the insured paid the broker or not, and irrespective of whether the policy was in the actual physical possession of the broker or the insured. There was no evidence that as be-

tween appellant and the broker that the latter must hold the policy for appellant until the premium therefor had been paid by the insured, or that if not paid promptly or within a certain length of time, the broker must surrender the same for cancellation instead of accepting it for, or delivering it to, or holding it for the insured. There was no evidence that as between broker and insured, that if insured did not pay promptly or within a certain length of time, that broker could cancel the policy. The evidence, in fact, demonstrates that broker did not expect prompt payment, and was making arrangements for payment over a period of time. There was no evidence that broker was a general agent of insured intrusted by insured to handle its insurance in a general way, or that broker at any time, in dealing for the insured with appellant or any insurance company, had ever surrendered a contract of insurance for cancellation. The evidence, on the contrary, supports the jury's conclusion that broker was instructed by insured not to cancel. We find nothing in the record which would tend to prove an ostensible agency. 1 Cal.Jur. 714, 741, 742. The cases cited by appellant (Kooistra v. Rockford Ins. Co., 122 Mich. 626, 81 N.W. 568; Fowler Cycle Works v. Western Ins. Co., 111 Ill.App. 631; La France Workshop Lampshade Co. v. Buffalo Ins. Co., 318 Pa. 191, 178 A. 1), are not applicable because in all of them there were ample facts proved from which an authority in the broker to cancel was found to exist. Since there was no evidence of ostensible agency, the trial court properly refused to instruct the jury on that subject.

[6] Complaint is made by appellant that the court erred in sustaining an objection to certain testimony he desired to introduce. The broker was asked:

"Q. Did you place other insurance for that company?" Thereupon the following proceedings were had:

"Mr. Neff: Object to it on the ground it is irrelevant and immaterial.

"The Court: I think any other would possibly be immaterial. We are only interested in the—

"Mr. Callaway: I am merely trying to show, Your Honor, that he dealt with them generally and had a right to rely—

"Mr. Neff (interposing): We will stipulate that Mr. Hawkins was the only one who dealt with Mr. Nicholls about insurance.

"Mr. Callaway: Do you deny his authority to buy insurance?

"Mr. Neff: No, we don't deny his authority. We admit he had full authority."

Appellant now contends that the question to which an objection was sustained was preliminary and that his purpose was to prove the authority of the broker to cancel policies. No such intent is suggested by the question nor by the statement of appellant's counsel as to what he was "merely trying to show." In fact the readiness with which the stipulation proffered by respondent was accepted indicates that the subject-matter of the stipulation was all that appellant had in mind. Under such circumstances, there was no error in sustaining the objection. Merz v. Poole, 82 Cal.App. 12, 254 P. 914; Snowball v. Snowball, 164 Cal. 476, 479, 129 P. 784; Whitelaw v. Whitelaw, 122 Cal.App. 260, 263, 9 P.(2d) 874; Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71; 2 Cal.Jur. 275.

[7] Appellant suggests that the insured ratified the act of the broker in canceling the original policy of insurance when, after receipt of the broker's letter mailed to insured on or about August 23d, the broker informed insured of the cancellation and advised insured that the reissued policies did not cover the accident, in spite of which insured continued to pay the premiums on the reissued policies. Insured, however, testified that at the time he made his original payment he paid on the original policy, and that after the receipt of the broker's letter he insisted to the broker that he was paying on the original policy. This gave rise to a question of fact which the jury resolved against the insurance company. The answer of the jury on said conflict is conclusive upon us. Rhee v. L. K. Small Co., 83 Cal.App. 339, 256 P. 839; Moody v. Judah Boas Finance Corporation, 93 Cal.App. 21, 268 P. 974.

[8] There is, however, another reason which would prevent any cancellation of said policy by ratification of a cancellation by the insured. Section 2313 of the Civil Code provides: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." The rights of the heirs at law (plaintiffs in this case) of the deceased, T. O. Hooker, had intervened before there was any ratification of the alleged cancellation by the insured. The loss or liability insured against in the insurance policy was for the benefit of these plaintiffs, and when

their cause of action accrued, no subsequent act of the insured could deprive them of it. Title Insurance & Trust Co. v. California Development Co., 168 Cal. 397, 143 P. 723; Dingley v. McDonald, 124 Cal. 682, 57 P. 574; Wittenbrock v. Bellmer, 57 Cal. 12; Krumdick v. White, 107 Cal. 37, 39 P. 1066. See, also, Taylor v. Robinson, 14 Cal. 396.

Furthermore, the policy itself expressly made this legal provision a part of its terms. Subdivision (b) of the paragraph on "California Financial Responsibility Act Coverage" provides: "This policy shall not be canceled or annulled as respects any loss or damage by any agreement between the company and the assured after the assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void."

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 67

HANNEL et ux. v. BATES et al.

Civ. 10007.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1936.

1. Mortgages ⇐578

Where in mortgage foreclosure suit three-year extension was pleaded and two-year extension was proved, and mortgagees alleged that defendants assuming mortgage agreed in writing to pay mortgage note, and written acknowledgment of indebtedness by defendants only was proved, variance between pleading and proof *held* immaterial.

2. Mortgages ⇐578

Alleged inconsistency in decree which adjudged that defendants assuming mortgage were liable for principal and interest of loan, but failed to make findings which would support deficiency judgment, *held* not prejudicial, where property was sold for amount sufficient to preclude entry of deficiency judgment.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Suit by J. W. Hannel and wife against B. L. Bates, Kenneth J. Kirkpatrick and wife, and others. From a decree for plaintiffs, defendants Kirkpatrick appeal.

Affirmed.

John F. Clark, of Los Angeles, for appellants.

Harry K. Smith, of Los Angeles, for respondents.

SPENCE, Justice.

This is an appeal by defendants Kenneth J. Kirkpatrick and Fay R. Kirkpatrick from a decree foreclosing a mortgage executed by defendant Bates, the predecessor in interest of the appealing defendants.

The note and mortgage were dated March 5, 1925, and the note was payable three years after that date. The appealing defendants purchased the mortgaged property in 1926, taking the property subject to the mortgage but not expressly agreeing to pay the same. Said defendants paid the interest thereon up to September 1, 1932. No payments were made upon the principal. This action was filed on December 8, 1933.

In the complaint, it was alleged that on or about August 1, 1931, plaintiffs and the appealing defendants had agreed in writing to an extension of three years, and that the written agreement signed by plaintiffs and said defendants was in the possession of said defendants. No demurrer was interposed to the complaint. In their answer said defendants denied these allegations and affirmatively alleged that the action was barred by the provisions of section 337 of the Code of Civil Procedure.

Prior to the trial plaintiffs served notice demanding the production of the alleged written agreement of extension. It was not produced, and plaintiffs introduced oral evidence of its contents. This evidence showed that the appealing defendants called on plaintiffs on August 2, 1931, in response to a letter written to them by plaintiff Marie Hannel; that at said time the question of extension was discussed and a writing was drawn "agreeing to extend the mortgage to Mr. and Mrs. Kirkpatrick" for two years; that said writing was signed by plaintiffs and the appealing defendants and was given to said defendants. It was admitted by said defendants that they discussed the extension with plaintiffs at that time, but they denied

that any writing was executed. Upon this conflicting evidence, the trial court found in favor of the existence of the written agreement of extension, and further found that the action was not barred.

[1] Appellants do not question the sufficiency of the evidence to support the findings or the sufficiency of the findings to support a decree of foreclosure. They do make a claim that the complaint was insufficient to state a cause of action against appellants, but this claim is devoid of merit. As we understand appellants' main contention, it is that there was a variance between the pleading and proof and that the decree should therefore be reversed. The argument seems to be, first, that a three-year extension was pleaded while a two-year extension was proved; and, second, that the pleadings alleged that appellants agreed in writing to pay the note while the evidence showed only a written acknowledgment of the indebtedness by appellant. While there may have been a variance, it appears entirely clear that it was not a material variance. Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A.L.R. 1024. In Murnane v. Le Mesnager, 207 Cal. 485, at page 495, 279 P. 800, 804, it is said: "Variance between the allegations in a pleading and the proof is not to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." We find nothing to show that the alleged variance misled appellants to their prejudice in maintaining their defense upon the merits. They concede that "respondents have some equities," and further state that, if the pleadings had shown that respondents were not seeking to impose a personal liability upon them, they "might have seen fit not to entail the expense of defending the action." They nevertheless claim that the judgment should be reversed "even if it be said that the only harm that resulted from the ill-founded allegations was to scare the appellants into court to defend against a lesser, but legitimate cause of action." We believe that these statements of appellants demonstrate that the alleged variance was wholly immaterial, and therefore insufficient to warrant a reversal.

[2] Appellants make the further claim that "the judgment is inconsistent with the findings." From the meager argument on this point, the claim appears to be based upon the fact that it was adjudged in the decree that principal and interest was due and owing from appellants to respondents while there were no findings which would support a deficiency judgment against appellants and the conclusions of law recited that no deficiency judgment could be entered against appellants. Assuming, without deciding, that the form of the decree would have permitted the entry of a deficiency judgment against appellants, even though the decree was silent on that subject, it is nevertheless conceded that the property has been sold pursuant to the decree for an amount sufficient to preclude the entry of any deficiency judgment. We therefore conclude that the alleged inconsistency between the decree and the findings could not in any event result in prejudice to appellants.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



12 Cal.App.2d 1

LADY v. PALEN.

Civ. 10672.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1936.

Hearing Denied by Supreme Court April 16, 1936.

1. Appeal and error ⇐1013

In action by attorney for libel, finding that attorney had not been injured in his reputation or business except in nominal amount was sustained where no error appeared in record by reason of attorney's failure to show any evidence of actual damage on appeal.

2. Appeal and error ⇐878(6)

On appeal by plaintiff from judgment awarding nominal and punitive damages, appellate court will not consider defendant's contention that there should not have been an award of punitive damages, as only errors urged by appellant will be reviewed.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by William Ellis Lady against Mary Agnes Palen. From judgment

awarding plaintiff $1 nominal and $200 punitive and exemplary damages, plaintiff appeals.

Affirmed.

Webster Hazlehurst and William Ellis Lady, of Los Angeles, in pro. per.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from a judgment in his favor predicated upon a cause of action for libel after a trial by the court without a jury.

The facts are:

November 16, 1934, defendant wrote and sent to a client of plaintiff, an attorney at law, a letter reading in part as follows:

"You have also further involved complications by employing Attorney (?) Lady, who is undoubtedly the vilest and most unscrupulous snake in Los Angeles or elsewhere, and who stoops to any and all villany and baseness to accomplish his ends, even to the extent of forcing a child to perjure herself against her own father, or any other form of unethical *tatics.*

"Perhaps you may feel that you have been grossly cheated (I hope you have not, but can assure you that if you remain in Los Angeles and deal with such crooks as Fisher and Lady, you will undoubtedly have that experience) if so perhaps you may also feel that you are retaliating, but you are depriving innocent and elderly people of their only home and just rights. * * *"

The trial judge rendered judgment in favor of plaintiff for the sum of $1 nominal damages and $200 punitive and exemplary damages.

Plaintiff relies for reversal of the judgment on the sole proposition that the trial court erred in awarding only nominal damages.

The trial court found that plaintiff had not been injured or prejudiced in his reputation as an attorney at law and had not lost or been deprived of any gains or profits which otherwise would have accrued to him in his profession and business and that he had suffered no actual or general damage whatsoever except nominal damage of the value of $1.

[1] This finding must be sustained, since plaintiff has not directed our attention to any evidence contrary thereto. No error, therefore, appears in the record. Snowball v. Snowball, 164 Cal. 476, 480, 129 P. 784; County of Sonoma v. Hall, 129 Cal. 659, 662, 62 P. 213; Marshall v. Hancock, 80 Cal. 82, 83, 22 P. 61.

It is deplorable, and defendant is to be severely censured for having so far disregarded the proprieties exacted of every citizen as to have made the unjustified and derogatory statements contained in her letter; however, we must presume in the absence of a contrary showing that the trial judge was so thoroughly satisfied of the untruth and inaccuracy of the statements, coupled with the excellent professional reputation of the plaintiff, as to have been convinced that he had suffered no actual damage.

[2] Only errors urged by appellant will be reviewed by this court (Trevaskis v. Peard, 111 Cal. 599, 600, 44 P. 246; Klauber v. San Diego Street Car Co., 98 Cal 105, 108, 32 P. 876; Garibaldi v. Grillo, 17 Cal.App. 540, 541, 120 P. 425), therefore we will not consider defendant's contention that there should not have been an award of exemplary and punitive damages.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 3

LADY v. PALEN.

Civ. 10673.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1936.

Hearing Denied by Supreme Court April 16, 1936.

1. Libel and slander ⇐129

Plaintiff in libel action was not entitled to counsel fees in addition to other costs where judgment recovered by plaintiff could have been rendered by an inferior court within the county, and hence precluded recovering any costs (Gen.Laws 1931, Act 4317, § 7; Code Civ.Proc. § 1032 (c), as added by St.1933, p. 1901, § 191).

2. Libel and slander ⇐129

Expenses incurred by successful plaintiff in libel action other than counsel fees and costs allowed by general law are not taxable (Gen.Laws 1931, Act 4317, § 7).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Appeal and error ⇐762

Constitutionality of provision of Code precluding recovery of costs where judgment could have been rendered by an inferior court was not considered where point was raised for first time in appellant's reply brief and no excuse was offered for not presenting point in opening brief (Code Civ.Proc. § 1032 (c), as added by St.1933, p. 1901, § 191).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by William Ellis Lady against Mary Agnes Palen. Judgment for plaintiff. From an order striking out his cost bill, plaintiff appeals.

Affirmed.

See, also, 54 P.(2d) 1133.

Webster Hazlehurst and William Ellis Lady, of Los Angeles, in pro. per.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

McCOMB, Justice pro tem.

Plaintiff appeals from an order striking out his cost bill after he obtained judgment in a libel action for the sum of $1 nominal and $200 punitive and exemplary damages.

This is the question presented for determination:

Is the plaintiff in a libel action, who recovers a judgment for less than $2,000, entitled to have taxed as items of cost:

(1) The sum of $100 to cover counsel fees under section 7 of Act 4317 of the state Legislature, volume 2, Deering's General Laws 1931, page 2161; and

(2) Other expenses incurred.

[1, 2] The first item is not properly taxable according to the decision in Rapfogel v. Klassen, 185 Cal. 524, 197 P. 795.

Neither is the second item legally taxable, in view of the decision in Jacobi v. Baur, 55 Cal. 554, 555, cited with approval in Rapfogel v. Klassen, supra, which holds that plaintiff is not entitled to costs in a libel action beyond those allowed by the general law, as provided in the Code of Civil Procedure.

In the instant case the judgment recovered was one that could have been rendered by an inferior court within the county, and hence costs were not allowed by the general law. Section 1032 (c), Code Civ.Proc., as added by St.1933, p. 1901, § 191.

[3] The point as to the constitutionality of section 1032 (c), Code of Civil Procedure, raised by plaintiff for the first time in his reply brief will not be considered by us, since no reason or excuse has been offered for not having presented the point in his opening brief. Newcomb v. Title Guarantee & Trust Co., 131 Cal.App. 329, 21 P.(2d) 456, 22 P.(2d) 552.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 133

YAMADA v. MASUE OSAWA et al.

Civ. 10707.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1936.

Rehearing Denied March 24, 1936.

Hearing Denied by Supreme Court April 23, 1936.

1. Appeal and error ⇐931(1)

Appellate court must view evidence in light most favorable to appellee and draw all reasonable inferences therefrom in his favor.

2. Brokers ⇐38(4)

In customer's action against stockbrokers and surety for brokers' conversion of customer's stocks, findings as to conversion, agency of brokers' employee, value of stock, and liability of surety, *held* sustained by evidence.

3. Brokers ⇐38(1)

Customer's demand for return of stock intrusted to stockbrokers for sale *held* unnecessary in action for conversion, where proof showed customer's ownership of stock delivered to stockbrokers and conversion by them.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by T. K. Yamada against Masue Osawa and others. From a judgment for plaintiff, all the defendants except one appeal.

Affirmed.

Walton C. Webb, of San Francisco, and Everett H. Smith, of Los Angeles, for appellants.

J. Marion Wright, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

All of the defendants except the defendant K. Hirano appeal from a judgment in favor of the plaintiff in an action for damages for conversion of certain stocks. Defendant Hirano defaulted, and judgment was entered against him, although his deposition was taken before trial and used as evidence by the other defendants.

[1] Viewing the evidence in the light most favorable to the party who was successful in the trial court, and drawing all inferences in his favor which may be reasonably drawn therefrom, which it is our duty to do, the following is a statement of the facts in the case: On September 30, 1930, the plaintiff was the owner and in possession of 300 shares of stock of the Tokio Subway, Inc., and of 100 shares of stock of Asano Cement Company. Defendant Hirano was a stockbroker and the employee and representative of the other defendants, except the bonding company. On that day the plaintiff delivered to Hirano, as such agent, the certificates of stock above mentioned, together with a power of attorney, and Hirano accepted them on behalf of said defendants for the purpose of selling them for the plaintiff at the price of 14 yen per share for the Tokio Subway stock and 13 yen per share for the Asano Cement stock. A yen was worth 49.40 cents in money of the United States. It was agreed that the Asano Cement stock would be sold immediately and that the Tokio Subway stock would be sold on or before October 31st. The market value of the stock at the time was at the prices above indicated. Hirano sold the 300 shares of Tokio Subway stock to Hakushin Sha in San Francisco and retained the 100 shares of Asano Cement stock in his possession with the consent, knowledge, and permission of Hakushin Sha. He later sold the stock for 17½ yen per share. This money he wrongfully appropriated and spent for his own use, although he reported to plaintiff that the stocks had all been sold as per their agreement and that the money would be paid to plaintiff when it came from San Francisco. Plaintiff demanded the return of the Asano Cement stock but was informed by Hirano that it, as well as the Tokio Subway stock, had already been sold. Plaintiff never received anything at all in payment for his stock, and the stock itself was never returned or tendered back to him.

During these transactions and at the time of the delivery of the stock by plaintiff to Hirano, and at the time of the sale by Hirano, there was in full force and effect a $5,000 stock broker's surety bond with the defendant bond company as surety thereon, as required by law for the benefit of any person suffering loss or damage by reason of any fraud or other act in violation of the provisions of the corporate securities act. This bond by its terms covered all activities on the part of Masue Osawa, Hakushin Sha, or any of their agents or employees.

By way of defense, the defendants offered in evidence a document entitled "Purchasing Contract," which was executed on the same day as the delivery of the stock by plaintiff to the defendants. This purchasing contract, however, concerned another transaction in stocks. The defendants did not follow up this attempted defense by advancing any evidence to prove that this purchasing contract was ever acted upon or performed by either party. It was the theory of the plaintiff and the holding of the court that this contract did not affect the transaction upon which suit was brought.

[2] It is the contention of the defendants that there was no substantial evidence to sustain the findings of the trial court as to conversion, agency, value of the stock and liability of the surety. We have read the record and find that there is substantial evidence to sustain the findings. It would serve no useful purpose to comment further upon this contention. Koeberle v. Hotchkiss (Cal.App.) 48 P.(2d) 104; People v. Groves (Cal.App.) 50 P.(2d) 813.

The defendants further contend that the delivery of the Asano Cement stock to Hirano was a private deal between Hirano and the plaintiff, and in their effort to sustain this contention devote considerable time to the deposition of Hirano, which was offered in evidence by them and which so states the facts to be. But the defendants must remember that it is not for this court to consider the evidence which is contradictory to the findings of the trial court nor to weigh the evidence with regard to said transaction. Upon appeal the search for evidence stops when the court finds in the record substantial evidence to sustain the findings.

The defendants earnestly contend that the so-called purchasing contract was the real contract between the parties, the one into which the plaintiff actually entered, and urge the long established rule that, when an agreement is once reduced to writing, oral evidence of the terms thereof is inadmissible in the absence of fraud or mistake, neither of which is here involved. This rule is a wise and just one; nevertheless the existence of a written contract for the purchase of the Nippon Industrial Bank stock did not preclude the making of a contemporaneous oral agreement for the sale of the Tokio Subway and Asano Cement stocks as found by the trial court.

[3] The defendants also contend that there was no proof of a demand for the return of the stock. The rule requiring a demand does not apply, however, where as in this case the facts in evidence show a conversion and where the defendants deny plaintiff's title and ownership, and where the proof shows that a demand would have been futile. Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83; 24 Cal.Jur. 1032, § 10; Carver v. Ketchum, 53 Idaho, 595, 26 P.(2d) 139.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



12 Cal.App.2d 111

TOFTE v. TOFTE.

Civ. 9588.

District Court of Appeal, Second District, Division 1, California.

Feb. 25, 1936.

1. Limitation of actions ⇐183(1)

Where defendant relies for answer upon any provision of statute of limitations applicable, he need not necessarily plead all statutes upon which he intends to rely in separate defenses.

2. Limitation of actions ⇐183(2)

Defendant relying for answer upon statute of limitations is required to state facts which bring case within operation of statute, and need not allege matters of law, but court will apply facts to law.

3. Limitation of actions ⇐183(2)

In alienation of affections action, defendant pleading statute of limitations *held* not precluded from claiming benefit of different statute not specially and correctly pleaded (Code Civ.Proc. § 339; § 340, subd. 3).

4. Limitation of actions ⇐183(1)

Nature of action rather than allegations of defendant's answer will determine what statute is applicable as bar to recovery.

5. Limitation of actions ⇐31

Wife's action for alienation of husband's affections, which was not commenced until nearly five years after wife and husband had separated at which time wife subsequently claimed in divorce action that husband had deserted her, *held* barred by limitations (Code Civ.Proc. § 340, subd. 3).

6. Appeal and error ⇐193(4)

Where defendant in alienation of affections action pleaded statute of limitations which was not applicable, objection to manner of pleading limitation *held* waived by failure of plaintiff to object to pleading at trial (Code Civ.Proc. § 339; § 340, subd. 3).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Elizabeth Tofte against Victoria Audet Tofte. Judgment for plaintiff, and defendant appeals.

Reversed.

Chas. H. Adkins, of Los Angeles, for appellant.

J. M. Stevens and Ben W. Henderson, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal from a judgment after trial before the court without a jury, in which respondent herein obtained judgment for $3,500 for the alienation of the affections of her husband by appellant.

Appellant assails the judgment first on the ground that plaintiff's cause of action was barred by the statute of limitations, and in pleading that defense in her answer defendant averred that "for further answer defendants allege that the said plaintiff's action is barred by the Statute of Limitation set forth in section 339 of the Code of Civil Procedure of the State of California," which section provides a two-year limitation.

Respondent contends, and appellant concedes, that this class of actions is barred

by the provisions of section 340, subdivision 3, of the Code of Civil Procedure, which limits the bringing of such actions to one year after the accrual of the cause of action. It appears to be the rule in this state that the one-year period of limitation applies to actions for alienation of affections. Code Civ.Proc. § 340, subd. 3; Harp v. Ferrell, 115 Cal.App. 160, 300 P. 978; Davis v. Conant (Cal.App.) 51 P. (2d) 151; Mohn v. Tingley, 191 Cal. 470, 471, 217 P. 733. It is respondent's contention that the defendant having pleaded section 339 and not the correct section, 340, subdivision 3, as a bar, that she was precluded at the trial and on appeal from claiming the benefit of the statute of limitations not specifically and correctly pleaded.

[1-4] With this contention of respondent's we do not agree. We are of the opinion that when a defendant relies for answer upon any provision of the statute of limitations applicable to cases of this nature he need not necessarily plead all of the statutes upon which he intends to rely in his separate defenses. The defendant relying for answer upon any provision of the statute of limitations is not required, nor do the rules of pleading permit him, to allege matters of law. The facts are required to be stated which bring the case within the operation of the statute, and the court will apply to them the law. To this action for alienation of affections the defendant pleaded that the cause of action accrued more than two years before the commencement of the suit, and if it accrued more than two years prior to the commencement of the action, it must of necessity have accrued more than one year before the commencement of the litigation, and consequently was barred by section 340, subdivision 3. The nature of the action, not the allegations of defendant's answer, will determine what statute is applicable as a bar to recovery. Boyd v. Blankman, 29 Cal. 19, 45, 87 Am.Dec. 146.

[5] The record in this case is replete with evidence that respondent knew and believed that her husband's affections had been stolen from her by the appellant herein as far back as 1927, and if added evidence were needed as to such knowledge on her part more than one year preceding the commencement of the action, it is found in her answer to the divorce case instituted against her by her husband and filed February 21, 1928, wherein she admits the allegation in her husband's complaint that she and her said husband separated December 15, 1927, upon which date she affirmatively alleges in her cross-complaint in the divorce action that her husband deserted her. The evidence clearly indicates that respondent herein and her husband never lived together as husband and wife after December 15, 1927. These facts justify but one reasonable conclusion, and that is that the parties did separate and the cause of action accrue on December 15, 1927. Since the action upon which this appeal is predicated was not filed until October 13, 1932, it is clear that the statute of limitations had already run.

Appellant herein pleaded in her answer that the cause of action was barred by the statute of limitations, and though she relied on the wrong section of the code in so pleading, yet she gave notice in her answer that she relied upon that defense. No demurrer or other objection was interposed to the answer, which, for the purposes of the trial, was assumed to sufficiently present the defense. And although the court made no findings on the issue presented by the affirmative defense, the record contained ample evidence to warrant the court in finding that the cause of action was barred by the statute of limitations. Churchill v. Woodworth, 148 Cal. 669, 676, 84 P. 155, 113 Am.St.Rep. 324.

[6] Under these circumstances, we are satisfied that the attempt to plead the statute of limitations should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of respondent to urge such objection in the trial court.

The conclusion we have arrived at on this point makes it unnecessary for us to consider the additional grounds urged on this appeal.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 114

J. & W. C. SHULL, Inc., v. ANGER et al.

Civ. 9923.

District Court of Appeal, Second District, Division 1, California.

Feb. 25, 1936.

Constitutional law ⇐168
Mortgages ⇐559(2)

Statute precluding deficiency judgment on trust deed obligation unless notice of breach and election to sell was recorded one year before sale *held* unconstitutional in so far as affecting instruments executed before effective date of statute (Civ.Code, § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Petition by J. & W. C. Shull, Incorporated, against Lou Anger and others. From a judgment sustaining demurrers of defendants without leave to amend, plaintiff appeals.

Reversed, with directions.

William B. Rodda, of Los Angeles, for appellant.

Carpenter, Babson & Fendler, of Los Angeles, for respondents.

ROTH, Justice.

Plaintiff and appellant filed a complaint asking for a deficiency judgment on a note secured by a deed of trust after sale of the property covered by said deed of trust, pursuant to the provisions thereof. Both instruments were executed contemporaneously and prior to the effective date of section 2924½ of the Civil Code, as added by St. 1933, p. 1674. The property covered by the deed of trust was sold within one year contrary to the provisions of said section, which require notice of one year in the event the beneficiary of the deed of trust and payee of the note desired to preserve his right to enforce a judgment for deficiency. The demurrers of the defendants and respondents were sustained without leave to amend, the sole point being that section 2924½ of the Civil Code having been violated, appellant, under the terms thereof, lost its right to sue for a deficiency.

Appellant is correct in its contention that the section is unconstitutional in so far as it affects instruments executed prior to the effective date of the statute. Brown v. Ferdon (Cal.App.) 46 P.(2d) 218; Id. (Cal.Sup.) 54 P.(2d) 712.

Judgment reversed, with directions to the trial court to allow defendants reasonable time within which to answer.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 105

PEOPLE ex rel. MOODY v. CARTER.

Civ. 10578.

District Court of Appeal, Second District, Division 1, California.

Feb. 25, 1936.

1. Municipal corporations ⇐79

Statute authorizing appointment of municipal representatives on directorate of Metropolitan water district by chief executive officers of municipalities *held* not to invalidate appointment by city council of one of its members to such directorate, where city charter provided for appointment of officers by city council, since, in case of conflict, provisions of charter prevailed (Gen. Laws 1931, Act 9129, § 6).

2. Municipal corporations ⇐141

Fact that city's representative on directorate of Metropolitan water district was member of city council which appointed him to such position *held* not to render him ineligible for appointment (Gen.Laws 1931, Act 9129, § 6).

3. Municipal corporations ⇐142

Provision of city charter requiring city commissioners, who composed city council, to devote their whole time to duties of their office, *held* not to disqualify council member from serving as city's representative on directorate of Metropolitan water district (Gen.Laws 1931, Act 9129, § 6).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Quo warranto by the People, on the relation of T. A. Moody, against William H. Carter. Judgment for defendant, and plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Smith & Dunn, by

John C. Dunn, all of Santa Monica, for the People.

Boyd C. Barrington, City Atty., and Robert N. Baker, Jr., Asst. City Atty., both of Santa Monica, for respondent.

ROTH, Justice pro tem.

Carter is the mayor and commissioner of public safety of the city of Santa Monica. During his incumbency of those positions, the city council of Santa Monica, composed of Carter and two others, elected Carter (Carter not voting) as the representative of Santa Monica to the directorate of the Metropolitan water district. Metropolitan Water District Act; Act 9129, Deering's General Laws 1931.

This action is one in quo warranto, and is in three counts. It is brought for the purpose of removing Carter from the board of the Metropolitan water district for the following reasons, each being the gravamen of a separate cause of action: (1) That the appointment of Carter was improperly made because it was not made by the chief executive officer of Santa Monica, as required by section 6 of the Metropolitan Water District Act; (2) that Carter was ineligible for such appointment because he was a member of the council which appointed him to the Metropolitan water board; (3) that he was not eligible for the appointment because the city charter required him to give all of his time to his charter duties and that he could not do so and act as a director of the Metropolitan water district.

[1] A demurrer to the complaint and each of its causes of action was sustained without leave to amend and from the judgment entered on said order this appeal was taken. The pertinent portion of section 6 of the Metropolitan Water District Act which is applicable here is as follows:

"All powers, privileges and duties vested in or imposed upon any district incorporated hereunder shall be exercised and performed by and through a board of directors; provided, however, that the exercise of any and all executive, administrative and ministerial powers may be by said board of directors delegated and redelegated to any of the offices created hereby or by the board of directors acting hereunder.

"The board of directors herein referred to shall consist of at least one representative from each municipality, the area of which shall lie within the metropolitan water district. Such representatives shall serve without compensation from the district and shall be designated and appointed by the *chief executive officers of municipalities,* respectively, with the consent and approval of the governing bodies of the municipalities, respectively." (Italics ours.)

Santa Monica has a commission form of government. The commission is made up of three commissioners; each being completely in charge of his department. The powers and duties of each are defined by the city charter and the three together compose the city council. The charter, article III, section 3, provides: "Section 3. The Commissioner of the Department of Public Safety shall be ex officio Mayor of the City, Chief of Police, Superintendent of Buildings, Health Officer and Fire Commissioner, and he shall perform the duties of said officers, as provided by law. * * *" It also provides (article V, § 1): "The Mayor is the executive officer of the corporation and must exercise a careful supervision over all its affairs. * * *" Article IV, section 2, of the charter, provides that "the said city council is the governing body of the city, * * *" and among the powers granted to the council by article II, section 14, are: "To create offices and provide for the election or appointment of officers other than those established by this charter, or by general law." Other than what is said in article V, section 1, about the mayor being the executive officer, the charter is silent upon the subject of the duties of the mayor, except that he "must exercise a careful supervision over all of its [the city's] affairs." Nowhere in the charter is the mayor given power to make any appointments. Under such circumstances we are of the opinion that the language of section 6 heretofore excerpted from the Metropolitan Water District Act is not violated because the appointment in this case was made by the city council instead of the mayor. The italicized language of section 6 which we have quoted contemplates that in some municipalities the executive officers may be plural and not singular. It is true, however, that this is not the sole construction which can be placed upon said language, since it may be argued that the phrase "executive officers" is used in a plural sense because of the plurality of the word "municipalities" which it modifies. We therefore do not rest the decision upon this point alone. If the language is susceptible of a singular construction alone, which is the contention of appellant, then there is a conflict between the provisions of the Metropolitan Water Dis-

trict Act and the provisions of the city charter. When there is such a conflict, the provisions of the charter must prevail. As said in the case of Ex parte Braun, 141 Cal. 204, 74 P. 780, 782: "It has always been conceded by all the justices that the object of the amendment [the Municipal Affairs clause in the Constitution] was to secure to the municipality that had, under the provisions of the Constitution, adopted a charter for its own government, the maintenance of its charter provisions in municipal matters, and to deprive the Legislature of the power, by laws general in form, to interfere in the government and management of the municipality." In the case of Bank v. Bell, 62 Cal.App. 320, at page 329, 217 P. 538, 542, the court says: "The powers of the cities are not derived from the Legislature but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all-embracing, restricted and limited by the charter only, and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. As to municipal affairs the charter, instead of being a grant of power, is, in effect, a limitation of powers. The city can exercise the power if the charter does not prohibit it." To the same effect are: City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.(2d) 745; Storke v. City of Santa Barbara, 76 Cal.App. 40, 244 P. 158; Jackson v. Wilde, 52 Cal.App. 259, 198 P. 822; Fragley v. Phelan, 126 Cal. 383, 58 P. 923; Rothschild v. Bantel, 152 Cal. 5, 7, 91 P. 803; Reclamation District v. East Day, etc., District, 91 Cal.App. 143, 266 P. 969; Raisch v. Regents, 37 Cal.App. 697, 174 P. 943; Inglewood v. County of Los Angeles, 207 Cal. 697, 280 P. 360; American Company v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622.

There is authority also to sustain the view that the language of section 6 is directory and not mandatory. People v. San Bernardino High School District, 62 Cal.App. 67, 216 P. 959, 961; Perry v. Gross, 172 Cal. 468, 156 P. 1031; Cake v. City of Los Angeles, 164 Cal. 705, 130 P. 723; Derby & Co. v. Modesto, 104 Cal. 515, 38 P. 900; Board of Education v. Board of Trustees, 96 Cal. 42, 30 P. 838. In the case of People v. San Bernardino High School District, supra, the court says: "'Shall' or 'must' are frequently construed as directory terms. Whenever the text of a statute and the intent of the Legislature as a body, as gathered either from the particular statute under consideration or from it in connection with other related statutes, show that the real meaning of the Legislature was that apparently mandatory words shall be given a directory meaning, they will be given such a construction." We conclude that the first cause of action did not and could not be amended so as to state a cause of action.

[2] The criticism of the second cause of action is squarely answered, on almost identical facts, by the case of McDonnell v. Improvement District, 97 Ark. 334, 133 S.W. 1126, 1128. In the foregoing case, one Cunningham was a member of the city council which appointed him as one of three persons to compose the board of improvement for the district. The eligibility of Cunningham to act on the board was attacked squarely on the ground that the city council could not appoint one of its own members to the board. With reference to this situation the court, in the McDonnell Case, said: "The next objection is that one of the commissioners was a member of the city council when he was appointed. The fact that he was a member of the city council did not render him ineligible to service as a commissioner of the district. The duties of the two positions are not incompatible with each other, and the only qualification specified by statute is that the commissioners shall be owners of real property in the district." See also People v. Provines, 34 Cal. 520; Niles v. Muzzy, 33 Mich. 61, 20 Am.Rep. 670; Ex parte Dailey, 93 Tex.Cr. R. [68], 59, 246 S.W. 91 [26 A.L.R. 138], The case of Abbott v. McNutt, 218 Cal. 225, 22 P.(2d) 510, 89 A.L.R. 1109, is not inconsistent with the foregoing authorities. That case merely decides that judges who were by provisions of a county charter made members of an election board were, if they acted as members of such board, public officers, and as such were vested with nonjudicial and extrajudicial functions, which is contrary to our constitutional principle that the government is divided into three branches.

We conclude, therefore, with reference to plaintiff's second cause of action, that there is nothing in the two positions which makes them so incompatible as to disqualify respondent from accepting an appointment on the board of directors of the Metropolitan water district.

[3] The third cause of action is predicated upon article III, section 2, of the charter, the pertinent portion of which is as follows: "* * * Each commissioner shall receive a salary of Three Thousand ($3000) Dollars per annum, payable in equal monthly installments at the end of each and every calendar month, and *each commissioner shall devote his whole time and attention to the duties of his office.* * * *" (Italics ours.) This provision of the charter, however, cannot affect respondent's right to serve on the board of the Metropolitan water district. There is nothing in the act creating the Metropolitan water district which disqualifies respondent from acting as a member of its board because he may occupy some official capacity in the city which he represents or because he may be under obligation to such municipality to devote all of his time and energy to the affairs of that municipality.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



KREBS et al. v. LOS ANGELES RY. CORPORATION.*

Civ. 10723.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1936.

Rehearing Denied March 24, 1936.

Hearing Granted by Supreme Court April 23, 1936.

1. New trial ⇐76(4), 162(3)

Where evidence as to nature and extent of plaintiffs' injuries is conflicting and trial court believes damages are so excessive as to indicate they have been given under influence of prejudice, trial court must grant new trial or require remittance by plaintiff.

2. Appeal and error ⇐933(1)

Where trial court granted new trial because of excessive damages upon failure of plaintiffs to remit certain amount as required by trial court, every intendment in favor of validity of order was required to be indulged, and order was required to be affirmed, unless plainly appearing that trial court abused its discretion.

3. Appeal and error ⇐933(4)

Where trial court granted new trial because of excessive damages awarded in action brought by husband and wife, presumption was indulged that order was made upon ground of excessive damages to husband as well as wife, and that damages were so excessive as to indicate they were given under influence of passion or prejudice.

4. New trial ⇐163(1)

Where trial court granted new trial for excessive damages after plaintiffs, who were husband and wife, refused to remit, that the sum required to be remitted was in excess of damages awarded to husband did not render the order erroneous.

5. Appeal and error ⇐1046(5)

That judge stated, after case had been submitted and not in presence of jury, that new trial would be granted in event of verdict for plaintiffs, *held* not prejudicial to plaintiffs.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Grace Krebs and another against the Los Angeles Railway Corporation. From an adverse order, the plaintiffs appeal.

Affirmed.

A. Brigham Rose and Paul Angelilo, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the plaintiffs from an order granting a new trial in an action wherein husband and wife sued as joint plaintiffs for damages sustained by each individually in separate counts. After a trial of several days' duration a jury returned its verdict for the plaintiffs and assessed damages as follows: $10,000 to the wife; $2,000 to the husband. Judgment was entered accordingly. Thereafter, upon motion of the defendant for a new trial, the court made the following order: "Matter heretofore submitted, it is now ordered that the defendant's motion for a new trial will be granted on the ground of excessive damages, unless with-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 61 P.2d 931.

in ten days the plaintiffs remit $7,500 in writing, and upon the filing of said remission the motion will be denied." The plaintiffs failed and refused to remit $7,500 in writing within the ten-day period, and thereupon the order granting a new trial became effective.

[1, 2] In an action of this character where the evidence as to the nature and extent of plaintiffs' injuries is conflicting and the trial court feels that the damages awarded are so excessive as to indicate that they have been given under the influence of passion or prejudice, it is not only the right but the duty of the court to grant a new trial, or it may in its sound discretion make an order such as set forth above. In such case every intendment in favor of the validity of the order must be indulged and the order affirmed, unless it plainly appears that in entering the order the trial court abused the wide discretion vested in it in passing upon a motion for a new trial.

[3] The plaintiffs contend, however, that the order granting a new trial was based upon the solitary ground of excessive damages to the wife. This contention cannot be sustained for the reason that the order does not limit the damages which it refers to as excessive to the wife alone, neither does it limit the degree of the excessiveness, and the presumption must be indulged that the order was made on the ground of excessive damages to the husband as well as the wife and that the damages were so excessive as to indicate that they were given under the influence of passion or prejudice.

[4] The plaintiffs' next contention is that the order was erroneous for the reason that the sum to be remitted was in excess of the damages awarded to the husband. We see no merit to this contention. The court was authorized to grant the motion for a new trial without condition. It made a condition for the benefit of plaintiffs which the plaintiffs at their option were privileged to accept. They refused to accept the option, and they may not now complain merely because they did not accept an option which was included for their benefit.

The plaintiffs next complain because the order was made upon the ground that the sum awarded was "too high." That, however, was not the ground upon which the order was made, but was merely oral talk which was not a part of the order.

[5] Finally, the plaintiffs complain because the court "evinced a prejudicial attitude throughout the trial and prognosticated before verdict by jury that a new trial would be granted in the event of a verdict for the plaintiffs." It may be that the trial court evinced a prejudicial attitude throughout the trial, but apparently it did not prejudice the plaintiffs in the eyes of the jury, which returned a verdict totaling $12,000. It did not indicate prejudice for the judge to say after the case had been submitted to the jury, but not in the presence of the jury, that a new trial would be granted in the event of a verdict for the plaintiffs. If, indeed, the court was prejudiced against the plaintiffs, which we do not hold, and the prejudice resulted in reversible error, then plaintiffs would be entitled to a new trial before a judge who was not prejudiced; but the order appealed from already gives them a new trial.

Order affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



12 Cal.App.2d 62

DOXEY v. DOBLE.

Civ. 9721.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1936.

1. Judgment ⇐153(1)

Period of one year from rendition of default judgment in action wherein defendant has not been personally served with summons within which default may be set aside *held* to commence at date of rendition of judgment and not entry of default (Code Civ.Proc. § 473a, as added by St.1933, p. 1852, § 35).

2. Judgment ⇐138(3)

Affidavit that defendant had never received copy of summons and complaint and had learned for first time of entry of default judgment approximately 11 months thereafter, and had not theretofore been advised that action was pending, *held* to warrant set-

ting aside default and allowing defendant to answer, where defendant had not been served personally with summons (Code Civ.Proc. § 473a, as added by St.1933, p. 1852, § 35).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Paul Doxey against Warren Doble, wherein a default judgment was entered against the defendant. From an order setting aside the judgment and granting defendant leave to answer, the plaintiff appeals.

Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Cross & Brandt, of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff obtained a default judgment against the defendant based on constructive service of summons in an action to recover a sum of money claimed to be due for labor and materials; and subsequently, on defendant's motion and pursuant to the provisions of section 473a of the Code of Civil Procedure (as added by St. 1933, p. 1852, § 35), the trial court made an order setting aside the judgment and granting defendant leave to answer. Plaintiff appealed from the order, and as first ground for reversal contends that the trial court did not exercise its jurisdiction in making said order within the limitation of time fixed therefor by said Code section. We find no merit in the point.

[1] Section 473a reads as follows: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time *within one year after the rendition of any judgment* in such action, to answer to the merits of the original action." (Italics ours.) Admittedly in the present action the summons was not personally served. It was published, and a copy of the complaint and summons was mailed to the defendant at Kassel, Germany. His default was entered on June 14, 1933, and on September 1, 1933, the cause was brought before the court for hearing, on which date judgment in plaintiff's favor was rendered by the court and entered by the clerk. On August 23, 1934, defendant presented his motion, attached to which was a copy of the answer he asked leave to file; and the motion was supported by defendant's affidavit in which he averred, among other things, that he never received the copy of the complaint and summons, and that not until August 2, 1934, did he learn of the pendency of the action and the rendition of the judgment. On August 30, 1934, the order was made granting leave to file the answer, which, as will be noted, was within one year after the rendition of the judgment, and therefore, construing said Code section literally, within the limitation of time fixed thereby.

Plaintiff contends, however, that, despite the plain and unambiguous wording of said Code section, the clause "within one year after the rendition of any judgment" should be construed to mean within one year after the entry of the default in the action. The contention is based upon the following premise: In 1933 the Legislature recast section 473 of said Code by splitting the second paragraph thereof. The first sentence of said paragraph remained part of the revised section 473, but the second sentence thereof was re-enacted almost verbatim into a separate section and numbered 473a; the reason given therefor by the Code Commission being that section 473 was too long and related to too many matters (see note to section 473a, Deering's 1933 Supplement to Codes, etc., p. 79). Before such segregation was made, the first sentence of said paragraph provided, as does section 473 now (St.1933, p. 1851, § 34), that the court may upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; "provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken"; and in dealing with proceedings instituted under the foregoing provision it has been held that, where a party defaults after personal service of summons and asks to be relieved of his default and the judgment entered pursuant thereto upon the ground of his mistake, inadvertence, surprise, or excusable neglect, the clerk's entry of the default and not the entry of the judgment by the court fixes the beginning of the six months within which his application for relief must be made. Title Ins. & Trust Co.

v. King Land & Imp. Co., 162 Cal. 44, 120 P. 1066; McLain v. Llewellyn Iron Works, 56 Cal.App. 58, 204 P. 869. Plaintiff argues, therefore, that in proceedings instituted for relief under the authority of section 473a (formerly the second sentence of the second paragraph of section 473), that is to say, in cases where judgment has been taken against a party, not because of any default on his part, but upon whom there has been no personal service of summons, the one-year period fixed by said section within which the trial court may exercise its discretion in allowing the defendant to answer should begin to run also from the date of the clerk's entry of the default and not, as the statute plainly states, from the rendition of the judgment. Plaintiff has cited no case, however, which sustains his view, and obviously, in the absence of forceful reasons, to place the construction contended for by him on the clear provisions of the newly enacted section 473a would not only do violence to the positive language employed by the Legislature in the enactment of that section, but of necessity would in effect require a revision of said section by striking therefrom its most important clause and substituting therefor a clause fixing a limitation of time for the exercise of the trial court's jurisdiction thereunder different from the one fixed by the Legislature; and of course the courts have no such authority to encroach on legislative power.

An analysis of the reasons given by the decisions for the adoption of the rule governing proceedings instituted by a defaulting party for relief upon the ground of his mistake, inadvertence, surprise, or excusable neglect clearly demonstrates that those reasons cannot be made to serve for the adoption of the same rule with respect to relief sought under section 473a. In the former class of cases, as the decisions point out, it is the "proceeding" involving the entry of the clerk's default which has been brought about by the party's own omission after personal service of summons, as distinguished from the entry of the judgment pursuant to such default, from which the party seeks to be relieved; and therefore it is held in conformity with the concluding provisions of that portion of the Code section that the application for relief in such cases must be made within six months "after such * * * proceeding [involving the entry of default] was taken. * * *" But, as will be seen, the provisions of section 473a cover an entirely different class of cases, namely, those where there has been no personal service of summons, and consequently no default on the part of the defendant brought about by his own omission from which he seeks to be relieved on the ground of his mistake, inadvertence, surprise, or excusable neglect; and in such cases it was evidently the intention of the Legislature, as indicated by the plain provisions of said Code section, to allow the trial court one year after the rendition of a judgment within which it may exercise its discretionary power in granting appropriate relief to enable the defendant to answer to the merits of the action.

The case of Macbeth v. Macbeth, 219 Cal. 47, 25 P.(2d) 11, which plaintiff emphasizes, is not in point, for the reason that, although involving a motion to set aside a judgment obtained through constructive service of summons, the decision did not turn on the question here presented. It was a divorce case, and the denial of the motion for relief was placed upon the ground that the motion was not made until approximately 23 months after the date of the entry of the interlocutory decree, which decree, the court held, it was necessary to set aside in order to grant effective relief. In discussing the issues there presented, the court referred to the rule of the cases relied on by plaintiff herein, governing the setting aside of default judgments obtained after personal service of the summons; and the cases of Title Ins. & Trust Co. v. King Land & Imp. Co., supra, and McLain v. Llewellyn Iron Works, supra, were cited as declaring such rule. But an examination of the decision in the Macbeth Case shows that the question of the application of the rule of the two cases cited was not the determinative factor in denying the motion.

[2] Nor do we find any merit in plaintiff's second point, that defendant's supporting affidavit is legally insufficient to warrant the granting of any relief. In this regard plaintiff contends that it is essential to aver facts surrounding, leading to, and resulting in the actual discovery of the existence of the judgment; that it is not enough to aver merely that the discovery thereof was not made until a certain date. As shown by the following cases, the rule sought to be invoked by plaintiff applies in cases where mistake, inadvertence, surprise, or excusable neglect constitute the grounds for relief, but does not govern in

cases such as we have here, where the default judgment is obtained without personal service of summons; Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990; Boland v. All Persons, 160 Cal. 486, 117 P. 547; Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.(2d) 277; In re Mercereau, 126 Cal. App. 590, 14 P.(2d) 1019. In the present case defendant avers in his affidavit in positive terms that he never at any time received a copy of the summons and complaint by mail or otherwise; that he learned for the first time on or about August 2, 1934, of the existence of the action and the entry of judgment; and that at no time prior to that date was he advised nor did he know that the action was pending. Such averments are amply sufficient to conform to the requirements of the decisions above cited.

The order is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



12 Cal.App.2d 137

ZANGER v. EATON et al.

Civ. 5515.

District Court of Appeal, Third District, California.

Feb. 25, 1936.

Specific performance ⇐121(4)

Evidence *held* to justify decree denying specific performance of contract for sale of realty on ground that no contract was ever consummated, where parties had different properties in mind during negotiations and minds never met.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Henry G. Zanger against William S. Eaton and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Owen D. Richardson, of San Jose, and C. W. Pearson, of Placerville, for appellant.

Elystus L. Hayes, of San Francisco, Henry S. Lyon, of Placerville, and C. B. Wooster, of San Jose, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This was an action for specific performance of an agreement for the sale of certain real property. The trial court denied relief, and this appeal was taken from the judgment.

William S. Eaton was the owner in fee of some 2,000 acres of land lying in El Dorado county, of which approximately 115 acres was known as Kentucky Flat, and on which C. B. Wooster held a lease and option to purchase, receiving a deed therefor from Eaton on December 19, 1933.

On November 1, 1933, A. Le Roy Parkinson and Henry G. Zanger submitted to Eaton a written offer to purchase the property, except that portion sold or leased to Wooster, for $20,000 upon certain terms and conditions. This offer was rejected by Eaton. On November 24, 1933, Wooster, who acted as agent for Eaton, transmitted an offer from Parkinson and Zanger to Eaton of $30,000 for the lands of Eaton, less a certain credit, the letter reciting, although claimed by Wooster to be a mistake, "including Kentucky Flat." On the same day Parkinson and Zanger agreed to pay Wooster $3,500 for his interest in Kentucky Flat contingent upon the acceptance of their offer by Eaton. On December 1, 1933, Eaton replied to this offer in a letter addressed to Wooster, wherein Eaton rejected the offer "for the property at El Dorado county," but submitted a counter offer of $30,000 net. This counterproposal addressed to Wooster read, "I cannot accept the offer which they have made. If they wish to buy the property they can do so on the following terms", and then is set forth the terms and conditions of payment. This offer was accepted by Zanger, he having acquired the interest of Parkinson, in the following language: "We have been shown your letter of December 1, 1933, to C. B. Wooster, setting forth your offer to sell all your property in El Dorado county, California. We accept your proposition * * *; we to accept title to the property showing all the exceptions set forth in the policy of title insurance. * * *" On December 18th, Eaton acknowledged receipt of the acceptance, adding, "you can of course arrange with him (Wooster) regarding the Kentucky Flat property if desired." Eaton did not include Kentucky Flat in the deed tendered under the acceptance, and this suit for specific per-

formance followed. Eaton testified he did not intend the letter of December 1st as an offer, but as a letter of instruction to his attorney. When Wooster exhibited the Eaton letter of December 1st to Zanger and Parkinson, he stated to them, "Gentlemen, I call your attention to the fact the description in that letter is very incomplete and that you are getting under it all Mr. Eaton's property except Kentucky Flat as described in my lease and amended lease."

The court found, among other things, that on December 14, 1933, Eaton was the owner of all the property in dispute except that Wooster was the owner of a lease and in possession of Kentucky Flat; that plaintiff knew as a fact that Eaton did not intend to include Kentucky Flat in the property he was offering for sale, and that the acceptance by plaintiff to Eaton was made to him direct and not through his agent, Wooster, in order to enforce an acceptance by Eaton of the offer to sell all the property, including Kentucky Flat, in spite of the fact plaintiff knew Wooster had an interest in Kentucky Flat and that the offer of Eaton was for the sale of the property exclusive of Kentucky Flat. The court also found plaintiff's actions were inequitable and an unfair attempt to override Eaton and to force a contract on him other than contemplated by him.

It is quite evident from the testimony adduced that the parties had different properties in mind during their negotiations and that their minds never met, and therefore no contract of sale and purchase was ever consummated. It is also apparent from the evidence and the findings of the court that plaintiff knew of the existence of the lease and option on Kentucky Flat in Wooster, and that plaintiff knew that Eaton at all times, in referring to "his property" in El Dorado county, did not consider Kentucky Flat as a part thereof.

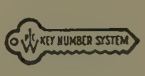
The unfairness of the attempt of Zanger to force upon Eaton the contract claimed by him, is evident in that on November 24, 1933, an offer of something over $31,000 for both properties was rejected by Eaton, and on December 1, 1933, Eaton agreed to accept $30,000 for "the property in El Dorado county," Zanger also knowing that Wooster was holding Kentucky Flat for $3,500. It is therefore apparent that Zanger could not claim in good faith to be acquiring both properties for $30,000 when less than a week prior thereto his offer of over $31,000 had been refused as inadequate.

Plaintiff, in any event, claims he is entitled to a decree of specific performance as to the property not included in Kentucky Flat at the rate agreed upon between the parties. This computation would allow Eaton something over $28,000 for his property, less Kentucky Flat, or approximately the same amount he would have received under the offer rejected by him in his letter of December 1st.

The question here involved, however, is not one of partial relief, but whether or not the minds of the parties met in the offer and acceptance or whether there ever was in fact a contract between the parties. The court having found that there was no contract to enforce, then there can be, of course, no specific performance.

The judgment appealed from is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



11 Cal.App.2d 708

LONG v. GENERAL PETROLEUM CORPORATION OF CALIFORNIA.

Civ. 9793.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1936.

1. Courts ⇐489(9)

State courts have concurrent jurisdiction with federal courts in enforcement of injured employee's right of action against employer for damages under Federal Merchant Marine Act (Jones Act, § 33, 46 U.S.C.A. § 688).

2. Venue ⇐2

Venue of injured employee's action against employer in state court for damages under Federal Merchant Marine Act must be determined in accordance with law of state wherein action is instituted (Jones Act, § 33, 46 U.S.C.A. § 688; Code Civ.Proc. § 395, as amended by St.1933, p. 1840).

3. Corporations ⇐666

Foreign corporation, complying with statutory requirements to do business in state, does not place itself on equal footing

with domestic corporations, which may be sued only in county where obligation or liability arises or its principal place of business is situated, but is nonresident, which may be sued in any county of state (Code Civ. Proc. § 395, as amended by St.1933, p. 1840; Civ.Code, §§ 405, 408, as added by St.1927, pp. 396, 397).

4. Constitutional law ⇐249
Venue ⇐3

Act authorizing trial of personal action against nonresident in any county designated in complaint *held* not unconstitutional as denying foreign corporations equal protection of laws (Code Civ.Proc. § 395, as amended by St.1933, p. 1840; Const.U.S. Amend. 14).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John C. Long against the General Petroleum Corporation of California. From an order denying defendant's motion to change the place of trial, it appeals.

Affirmed.

Martin J. Weil and W. L. Appleford, both of Los Angeles, and Harris F. Shaw, of San Francisco, for appellant.

Resleure, Vivell & Pinckney, of San Francisco, for respondent.

KNIGHT, Justice.

The defendant, a foreign corporation authorized by this state to transact herein intrastate business, made a motion in the above-entitled action to change the place of trial thereof from the city and county of San Francisco to the county of Los Angeles upon the ground that it was and is a resident of the latter county and has its principal offices and place of business therein. The motion was denied, and it has appealed from the order made in that behalf. We find no error in the trial court's ruling.

The action is one for damages instituted under the authority of a federal statute known as the Jones Act (see section 33, Merchant Marine Act of June 5, 1920, c. 250, U. S. C. A., title 46, § 688), it being alleged in the complaint that during the course of plaintiff's employment as a fireman aboard the defendant's tanker Lebec and while the ship was moored at a dock at West Portland, Or., he sustained personal injuries which were proximately caused by his employer's negligence.

[1, 2] It is well settled that state courts have concurrent jurisdiction with federal courts in the enforcement of such a right of action (Engel v. Davenport, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813; Panama R. Co. v. Vasquez, 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed. 1085); furthermore that if the federal jurisdiction be invoked, the action must be brought, as provided in said act, in the court of the district in which the employer resides or in which his principal office is located, and that if the action be brought in a state court the venue must be determined in accordance with the law of the state wherein the action is instituted. Bainbridge v. Merchants', etc., Transportation Co., 287 U.S. 278, 53 S.Ct. 159, 77 L.Ed. 302. Section 395 of the California Code of Civil Procedure, as amended by St.1933, p. 1840, governing the place of trial of personal actions against nonresidents, provides that "if none of the defendants reside in the State * * * the action may be tried in any county which the plaintiff may designate in his complaint"; and in this connection it has been definitely held that in the absence of any special statute to the contrary, a foreign corporation authorized to transact business in this state has no residence in this state; that it is a resident of the state of its creation and that consequently a personal action may be brought and tried against a foreign corporation in any county in the state. Thomas v. Placerville G. Q. M. Co., 65 Cal. 600, 4 P. 641; Waechter v. Atchison, etc., Ry. Co., 10 Cal.App. 70, 101 P. 41; Ryan v. Inyo Cerro Gordo Min., etc., Co., 41 Cal.App. 770, 183 P. 250.

[3] Defendant contends, however, that the rule of the cases last above cited concerning the residence of a foreign corporation was nullified by the subsequent repeal (St.1917, p. 381) of sections 405 and 408 of the Civil Code and the re-enactment in 1927 (St.1927, p. 396) of section 405; that the re-enacted section contains provisions different from those embodied in the repealed sections, and that by complying with the requirements of section 405 as re-enacted, defendant, as a foreign corporation, placed itself on an equal footing with a domestic corporation which under section 16 of article 12 of the State Constitution "may be sued in the county * * * where the obligation or liability arises * * * or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in

other cases." We are unable to sustain such contention.

The provisions of said section 405 as re-enacted provide merely, so far as we are here interested, that before transacting intrastate business in this state a foreign corporation must file with the secretary of state a certified copy of its articles and a statement setting forth (1) the location and address of its principal offices; (2) the location and address of its principal office within the state; and (3) the name and address of some person in the county in which its principal office in this state is located upon whom process directed against said corporation may be served; and sections 405 and 408 (St.1907, pp. 558, 559) prior to their repeal required a foreign corporation to file with the secretary of state a copy of its articles and a designation of some person in this state upon whom process could be served; also a copy thereof duly certified as prescribed in section 408 with "the county clerk of the county *where its principal place of business is located,* and also where such corporation owns property." (Italics ours.) It will be seen, therefore, that the only change brought about by the repeal and re-enactment of said Code sections was in the form of procedure that shall be followed by a foreign corporation seeking to transact in this state intrastate business, and that such change did not nor do the terms of the re-enacted section themselves purport to have any bearing whatever upon the question of the domicile of a foreign corporation; and as expressly held in the Waechter Case, supra, in construing the effect of the statutory requirements of sections 405 and 408 prior to their repeal, a foreign corporation by complying with those requirements, and consequently authorized to transact intrastate business, does not thereby become a domestic corporation. Moreover, two cases have arisen and been decided since the 1927 re-enactment of section 405 wherein the reviewing court restated the rule of the earlier cases that a foreign corporation, by complying with statutory requirements to transact business in this state, does not establish a residence in any particular county, such as is contemplated by the provisions of the Code of Civil Procedure relating to the place of trial. Herbold v. Atchison, etc., Ry. Co., 117 Cal.App. 430, 4 P.(2d) 184; Rowland v. Bruton, 125 Cal.App. 697, 14 P.(2d) 116.

[4] Defendant further contends that in any event a state statutory regulation or judicial doctrine purporting to treat foreign corporations differently from domestic corporations in the matter of designating the place of trial of personal actions brought against them, is violative of that clause of the Fourteenth Amendment to the Federal Constitution which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. The contentions made in this behalf are fully disposed of by the decision in the case of Cincinnati Street Ry. Co. v. Snell, 193 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604. It is there held that the mere direction of the state law that a cause under given circumstances shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guarantee of equal protection of the laws where in both forums equality of law governs and the equality of administration prevails; and that therefore, given a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another; that it is not under any view the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail; in other words, that it is the fundamental rights which the Fourteenth Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. And in the present situation, it matters not in which particular county in the state an action of this kind may be brought and tried, or whether it be brought against a foreign or a domestic corporation, because the law governing the fundamental rights of either corporation in the trial and determination of the action in any county in the state are the same and an equality of administration therein prevails.

The effect of the statute involved in the case of Power Mfg. Co. v. Saunders, 274 U. S. 490, 47 S.Ct. 678, 71 L.Ed. 1165, cited by defendant, is quite different from that presented by the laws under consideration here, and for that reason the decision in that case is not here controlling.

The order appealed from is affirmed.

We concur: TYLER, P. J., CASHIN, J.

12 Cal.App.2d 70

COOK v. COOK.

Civ. 10819.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1936.

Hearing Denied by Supreme Court April 20, 1936.

Evidence ⇐441(11)

In action to quiet title against claimed lien by payee of note given by plaintiff in full settlement of claim for services, but not providing for lien, parol evidence of alleged agreement that lien should be given payee and that payee accepted note upon understanding that it created a lien *held* properly excluded (Code Civ.Proc. §§ 1856, 1971; Civ.Code, § 1625).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action to quiet title by Mary J. Cook against William Doron Cook. From a judgment for plaintiff, defendant appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Willcox & Judson, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to quiet her title to a parcel of real estate in the county of Los Angeles, the complaint containing the usual allegations in actions of the kind. Defendant, William Doron Cook, appeals from a judgment in plaintiff's favor.

In his answer, appellant alleges the following: From 1913 to 1917 he performed labor upon a ranch situated in Riverside county owned by his parents, William H. Cook and Mary J. Cook. On March 11, 1926, he and his parents agreed upon the sum due for the labor and they then signed and delivered to him a note in the following language: "At our option before death, or to be collected from the estate of the last survivor of us after death, for value received, I, we, or either of us, promise and agree to pay William Doron Cook and C. Marie Cook, husband and wife, now of Los Angeles, California, or order, the sum of Thirty-five Hundred and no/100 ($3,500) Dollars, with interest thereon at the rate of seven per cent. (7%) per annum, from the first day of September, 1917, both principal and interest payable in gold coin of the United States, at the City of Los Angeles, in the County of Los Angeles, State of California. This note is given in full payment and settlement of the balance now due, for services rendered to the undersigned by William Doron Cook, upon the ranch property at Riverside, California, in which the undersigned had an interest, and which property was held and recorded in the name of William H. H. Goodwin, who was also interested in said ranch with the undersigned." The answer further sets forth: "That at the time of the delivery of said instrument to this defendant, William H. Cook and Mary J. Cook and each of them did represent that it was the intention of said William H. Cook and Mary J. Cook that the indebtedness agreed to be paid in said instrument, at the time and in the manner therein specified, should be secured by a lien upon all real property then owned by William H. Cook and Mary J. Cook, or either of them, and that by said instrument a lien was so created." It is further alleged in the answer that appellant accepted the instrument with the understanding that the instrument created a lien in his favor. On August 30, 1929, a new instrument was executed by William H. Cook and Mary J. Cook in the same language as the note of May 11, 1926, except that the name of Marie C. Cook does not appear therein as payee. Appellant makes allegations with reference to the intentions, representations, and understanding of the parties similar to the allegations concerning the note dated May 11, 1926. William H. Cook died October 2, 1930. According to the answer, appellant was advised on November 12, 1930, that the instrument held by him did not create a lien upon plaintiff's property and he thereupon filed a claim of the lien in the recorder's office. On July 1, 1932, Mary J. Cook desired to execute a mortgage on her property in the sum of $1,000 and upon her request appellant released his claimed lien, but on July 20, 1932, caused another and similar claim of lien to be filed. Appellant further alleges in his answer that plaintiff has conveyed a substantial portion of her property to her daughter without consideration. He seeks to have the court impress the Los Angeles real estate owned by plaintiff with a lien in his favor in the sum of the note.

The trial court sustained plaintiff's objection to the introduction of evidence in support of the allegations above set forth and this ruling is attacked by appellant. No documentary evidence was offered other

than the promissory note, and appellant admitted in court that he had none to offer. The instrument in question is complete and free from ambiguity. Parol evidence cannot be received to contradict, add to, or subtract from its terms. Section 1856, Code Civ. Proc.; Jones Commentaries on the Law of Evidence in Civil Cases, vol. 3 (1913 Ed.) p. 145; Offerdahl v. Brydges, 45 Cal.App. 654, at page 655, 188 P. 612; Seitz v. Brewers', etc., Machine Co., 141 U.S. 510, 12 S.Ct. 46, 35 L.Ed. 837. The execution of the instrument superseded all the stipulations which preceded or accompanied its execution. Section 1625, Civ.Code. Appellant cannot obtain the relief sought without the presentation of an instrument in writing providing therefor. Section 1971, Code Civ.Proc. This he has not done.

The judgment is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



11 Cal.App.2d 686

BEATTIE v. MILLIKEN et al.

Civ. 9642.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1936.

Hearing Denied by Supreme Court April 10, 1936.

Appeal and error ⇐1002

Jury's finding on conflicting evidence on questions whether motorist, having stopped to clean windshield on foggy night, could have removed automobile from highway, and whether guest in automobile colliding therewith negligently failed to caution host, could not be disturbed on appeal.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Virginia Beattie against Ralph Milliken and Lois B. Nichols. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Lobdell & Watt, by Carol G. Wynn, all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages resulting from an automobile collision.

Appellant was driving an automobile on Cucamonga road in Los Angeles county at night, when an automobile driven by defendant Milliken, in which plaintiff was riding as a guest, collided with the rear end of the automobile operated by appellant. The night was foggy and appellant had stopped her automobile on the highway for the purpose of cleaning the windshield of moisture which had collected thereon.

It is contended that the evidence fails to show any negligence on the part of defendant and appellant, and, further, that the evidence conclusively shows negligence on the part of the respondent proximately contributing to her injuries. These two controversies result principally from the dispute as to whether or not the defendant could have removed her automobile off the highway at the side thereof, and whether or not the plaintiff had negligently failed to caution the driver of the automobile in which she was riding, or to protest at the speed the car was traveling. These questions were presented to the jury on conflicting evidence and the jury found in favor of the plaintiff; such a finding obviously cannot be disturbed on appeal.

It is further contended that the court erred in giving certain instructions, in modifying certain instructions requested by appellant, and in refusing to give certain of appellant's requested instructions.

Under the evidence presented at the trial, the jury was fairly and adequately instructed on the issues involved, and the record does not justify the assumption that prejudicial error resulted from the trial court's rulings in this regard.

Judgment is affirmed.

I concur: YORK, J.

HOUSER, Presiding Justice.

I dissent. In substance, the principal reason that is assigned by my associates for an affirmance of the judgment is, that with reference to the several issues of the negligence of defendant and the contributory negligence of plaintiff, respectively, the evidence on each of such issues was "conflicting," and that in such circumstanc-

es the implied finding by the jury cannot be disturbed by this court. Where such a condition prevails, especially in an appeal from a judgment that has been rendered in an action for damages that have arisen from personal injuries that have been sustained by the plaintiff therein, in an automobile collision, such a statement may be fairly accurate. But it is strictly true only when the evidence adduced on the trial shows that a real "conflict" exists as to the essential facts in the case. An exception to the general rule exists where it appears that notwithstanding the fact that the evidence adduced in behalf of the plaintiff in the action conflicted with that presented in behalf of the defendant therein, if, after wholly disregarding the defendant's evidence with reference to such negligence and considering the evidence in that regard introduced by the plaintiff only, it becomes manifest that, as a matter of law, the defendant could not be adjudged guilty of negligence; and in such circumstances, the fact that a jury may have decided to the contrary should neither preclude nor deter an appellate tribunal from exercising its lawful right and duty in the premises. And, conversely, the same rule applies where a question of the contributory negligence of the plaintiff is involved in the action. And so in the instant appeal, if notwithstanding the fact that as to some incidental or immaterial facts the evidence presented on the trial of the action on the one side may not entirely agree with the evidence produced on the other, nevertheless, if in the main and determinative facts no real conflict exists, the fact that the jury may have impliedly absolved the plaintiff from contributory negligence, and that likewise it may have resolved that the defendant was guilty of negligence, will present no insuperable obstacle to this court in its application of legal principles to the controlling facts in the case. With so much as a foundation, it may be not improper to state the pertinent facts regarding which no dispute exists, or is claimed to exist between the respective parties, to wit:

At the time when the accident in question occurred, plaintiff was an intelligent young woman of 19 years of age; was a student at Pomona college; and as the guest of one Milliken, was then riding in an open automobile on a paved road of the width of 24 feet. The road was flanked with a dirt or gravel shoulder for a width of from 2½ to 4 feet that sloped downward into a ditch that was about 1 foot deep and which was used for the purpose of carrying surplus irrigating water. The shoulder was more or less covered with grass and weeds. The accident occurred on a "densely" foggy night—so foggy that Milliken testified that the greatest distance at which an automobile would have been visible did not exceed 21 feet from the point where he was sitting in the automobile that he was driving—from 12 to 21 feet, to be more nearly exact. In such circumstances, although Milliken was driving at a rate of 20 miles per hour, he made no effort to increase the distance of his vision, either by cleaning the mist from the windshield of the automobile or by attempting to look around the windshield. However, in the latter particular, plaintiff did make such an effort, but could see no further than 10 feet. In fact, she was barely able to see dim "shapes" of trees on the side of the road that were not over 10 feet from where she sat in the automobile. She also observed that during all the time that the automobile was traveling a distance of 500 feet immediately preceding the point where the accident occurred, although the automobile was traveling at a rate of 20 miles per hour, Milliken neither attempted to clean the windshield, to look around it, nor to make any other effort to increase the distance of his vision. Manifestly, Milliken was guilty of negligence that contributed proximately to the happening of the accident; and plaintiff, who was fully aware of his negligent acts in the premises, made no protest to him concerning any part of such conduct, nor made even the slightest effort to better the existing conditions to the end either that a collision with defendant's automobile, or with any other object on the highway, might be prevented. Considered from a standpoint of exercising care that an accident might not result, as far as the occupants of the automobile in which plaintiff was riding were concerned, each of them might just as well have been blindfolded. To my mind, plaintiff's absolute and total failure in regard to using the care that under the circumstances she should have used also constituted contributory negligence that should have prevented her from recovering a judgment against the defendant.

Moreover, it is not controverted that defendant, having observed the fact that the fog was very dense and that mist on the windshield of her automobile obscured her vision, for the purpose of cleaning the

windshield drove her automobile to the right side of the pavement, in a position where the wheels thereof on its right side were not more than one foot from the extreme right edge of the pavement; and even not taking into consideration either the condition of the shoulder of the road, or the depth of the ditch, at most (without allowing for the overhang of the mudguards on defendant's automobile, but estimating solely from the position occupied by the right wheels of defendant's automobile) it was no greater distance from the extreme right edge of the entire road than 5 feet. The width of the automobile was about 5½ feet; and in complete compliance with statutory requirements, from where it stood on the road a clear space was left on the highway of about 17½ feet "for the free passage" of the automobile occupied by plaintiff. Section 136, Cal.Vehicle Act (St.1923, p. 561, § 136, as amended by St.1931, p. 2128). The light on the rear of defendant's automobile was burning at all times. Considering the fact that the night was "densely" foggy; that the dirt shoulder on the road was covered with vegetation; that the shoulder was from 2½ to 4 feet wide only, and sloped down into an irrigating ditch that was approximately 1 foot deep; and that as a consequence, without getting the wheels on the right side of defendant's automobile into that ditch, it was impossible to get the automobile wholly off the pavement; it is difficult as a matter of law, to determine in just what particular defendant may be said to have been negligent. To my mind, in the circumstances then present, neither as a matter of fact nor as a matter of law was it "practicable to park or leave such vehicle standing off of the paved * * * portion of such highway," as provided by the terms of section 136, California Vehicle Act; besides, a clear space of more than 15 feet between defendant's standing automobile and the further side of the paved road was available "for free passage" to the automobile that was driven by Milliken (section 136, Cal.Vehicle Act), which was all the care that was demanded of plaintiff by the terms of the statute. I am not convinced that as a matter of law defendant was guilty of a violation of any of the provisions of the California Vehicle Act, or of any other statute, or "rule of the road" to which the attention of this court has been directed.

11 Cal.App.2d 730

GOMEZ v. LINDBERG et al.

Civ. 1578.

District Court of Appeal, Fourth District, California.

Feb. 17, 1936.

1. Trial ⇐165

Upon motion for nonsuit, particularly when made at close of plaintiff's case, all the evidence must be construed most strongly against defendant, and all evidence in favor of plaintiff must be taken as true, and any contradictory evidence must be disregarded.

2. Automobiles ⇐245(81)

On motion for nonsuit, evidence *held* insufficient to establish, as matter of law, that motorist, who was injured when overtaking motorist collided with him as he attempted to make left turn into private road, had failed to signal for left turn and to make turn around center of intersecting road (St. 1925, p. 413, § 130; St.1929, p. 541, § 129).

3. Automobiles ⇐245(60, 81)

Alleged failure of motorist, injured in collision occurring as he was making left turn into private road, to make turn around center of intersecting road as required by statute, was not contributory negligence as matter of law, since violation of such a statute is not negligence per se unless violation proximately causes or contributes to injury, which is a jury question where evidence is conflicting or permits of different inferences (St.1929, p. 541, § 129).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Pablo Gomez against Clarence E. Lindberg and another. From a judgment for defendants, plaintiff appeals.

Reversed.

Richard L. Gray, of Los Angeles, Wallace P. Rouse, of Indio, and Harold D. Kraft, of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after the granting of a motion for nonsuit. The motion was granted upon the ground that the evidence showed plaintiff guilty of contributory negligence as a matter of law.

[1] The general rule governing the granting of motions for nonsuit is clearly

stated in 9 California Jurisprudence, 551, as follows: "It is, therefore, well settled that upon a motion for nonsuit, particularly when made at the close of plaintiff's case, all the evidence must be construed most strongly against the defendant. Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the plaintiff. If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given it must be disregarded. On such motion the court has nothing to do with the question of the credibility of the witnesses, nor with the testimony tending to create a conflict. It has nothing to do with any apparent disagreement as to the facts among plaintiff's witnesses, nor with any conflicts between the evidence brought out on direct and cross-examination. The evidence of the plaintiff which is relevant to the issues is to be given its full probative strength, whether or not it has been erroneously admitted." See cases there cited, and cases cited in Cal.Jur., Ten-Year Supp., vol. 5, pp. 234 et seq., § 35. With this rule in mind we need only consider such evidence as is favorable to plaintiff. We will disregard all conflicts and all evidence favorable to defendants of which the transcript contains much.

Between 6 and 7 o'clock on the morning of February 23, 1933, plaintiff and defendant Lindberg were each driving easterly on that portion of Highway 99 connecting Indio and Oasis in Riverside county. Plaintiff was ahead in a model T Ford touring car. Defendant Lindberg was following in a Ford V-8. Plaintiff made a left turn into a private drive leading to the farm of his employer. During this maneuver the two cars came into collision near the northerly or left-hand edge of the paved portion of the road. Both cars were damaged and the drivers were injured. Plaintiff had been driving between 25 and 30 miles an hour until he started to make the turn when he slowed down to about 10 miles per hour. Lindberg was driving about 42 miles an hour until he attempted to pass plaintiff's car on its left when he increased his speed. After the two cars came to rest, there were two parallel tire burns caused by the wheels of Lindberg's car, which burns extended about 120 feet westerly from the point of collision.

[2] Defendants rely upon two acts of plaintiff which they maintain show him guilty of contributory negligence as a matter of law and which prevent his recovery They contend: (1) That he failed to give the signal for the left turn "continuously during the last fifty feet traveled by the vehicle before turning" as required by section 130 of the California Vehicle Act (St. 1923, p. 558, § 130, as amended by St. 1925, p. 413) in effect at the time of the accident; and (2) that he did not pass "to the right of and next to the center of the [intersecting] roadway" before making the turn as then required by section 129 of the California Vehicle Act (St.1923, p. 558, § 129, as amended by St.1929, p. 541). In support of the first contention they urge that before starting his turning movement plaintiff did not see that it could be made in safety (section 130, Cal.Vehicle Act), but turned into the immediate path of the Lindberg car when it was in the act of passing.

In the plaintiff's testimony we find the following:

"Q. And how far was the car from you then? A. Why, four, five hundred feet from me.

"Q. And then what did you do? A. And then take my hand out, make my turn.

"Q. How did you hold your hand? A. Right straight (demonstrating).

"Q. Indicating horizontal, from the shoulder. How far, Mr. Gomez, was that from Mr. Payne's driveway when you held out your hand? A. Oh, about 100 feet or so.

"Q. And then what did you do, Mr. Gomez? A. I drive in."

He testified further:

"Did you make a sharp or a gradual turn into the Payne ranch? A. I cut across straight.

"The Court: Across what? A. Across the pavement to enter the driveway. * * *

"Q. Did you hold your hand out all the time from the time you put it out until you completed the turn? * * * A. Until I started to go straight.

"Q. (Mr. Gray) After the turn? A. Yes."

We have reached the conclusion that the foregoing testimony justifies the reasonable inference that when the Lindberg car was at least 400 feet to the rear of plaintiff's car plaintiff gave the proper signal for a left turn and continued the signal during the start of the turn and that he did not cut the corner, but turned squarely into the private driveway. We are assuming, without holding, that the provisions of section 129 of the California Vehicle Act as in force in 1933 were applicable to the intersection of a private drive with a public road.

[3] Another reason why the failure of the plaintiff to make the turn around the center of the intersection of the highway and the private road, if the law required him to so turn and if he failed so to do, should not be held to be contributory negligence as a matter of law which would prevent his recovery, is found in the following rule announced in Skaggs v. Wiley, 108 Cal.App. 429, 292 P. 132, 133: "Where the view is thus obstructed, a failure to observe the statutory requirement as to speed will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury (Mathes v. Aggeler & Musser, etc., Co., 179 Cal. 697, 178 P. 713; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Williams v. Southern Pac. Co., 173 Cal. 525, 160 P. 660; Thomas v. German, etc., Society, 168 Cal. 183, 141 P. 1186), and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence, this question is one for the jury (Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 P. 84)." See, also, Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.(2d) 835; Blodget v. Preston, 118 Cal.App. 297, 5 P.(2d) 25; Morehead v. Roehm, 118 Cal.App. 312, 4 P.(2d) 995; Hawthorne v. Gunn, 123 Cal. App. 452, 11 P.(2d) 411. In the Morehead Case the same rule was applied where plaintiff failed to give the required arm signal before making a turn into an intersecting street.

From what we have just said it follows that the motion for nonsuit should not have been granted. We wish it understood that we are not expressing any opinion on what the decision of the trial judge or the jury should be on the question of the contributory negligence of plaintiff when the case is submitted on its merits. We are only expressing the opinion that under the evidence before the trial judge the question was one of fact to be decided by the trier of fact and not one of law to be decided by him on a motion for nonsuit.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 168

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. GOLDBERG et al.

Civ. 5532.

District Court of Appeal, Third District, California.

Feb. 27, 1936.

1. Guaranty ⇐62

Guarantor of mortgage note *held* not released from liability by mortgagee's waiver of recourse against property of deceased mortgagor's estate other than mortgaged property, since guarantor could protect himself by filing contingent claim against deceased mortgagor's estate (Probate Code, §§ 707, 716).

2. Appeal and error ⇐173(12)
Guaranty ⇐87

Guarantor relying on release must affirmatively plead and prove facts establishing release, and cannot raise question of release for first time on appeal.

3. Mortgages ⇐495

Foreclosure decree directing commissioner to deduct from proceeds of foreclosure sale his fees, disbursements, commissions, and costs, and to pay mortgagee principal, interest, expenditures for preservation, attorney fees, and interest from date of decree was modified as to estate of deceased mortgagor, where mortgagee waived recourse against property belonging to estate other than mortgaged property, and waived costs by directing that lien on mortgaged property be for principal of note, expenditures made under mortgage provisions for preservation of property, and interest provided in note or mortgage (Probate Code, § 716).

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Foreclosure suit by the Bank of America National Trust & Savings Association against Max Goldberg and others. From a judgment of foreclosure, defendant Abraham Horovitz, individually and as administrator of the estate of Rebecca Goldberg, deceased, appeals.

Affirmed as modified.

James R. Jaffray, of Los Angeles, for appellant.

Louis Lombardi, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of foreclosure of a mortgage upon real property. The note secured by the mortgage was executed by Max Goldberg and Rebecca Goldberg, and signed by Abraham Horovitz as guarantor, in the following terms: "For value received I hereby guarantee payment of the within obligation and all renewals of extensions thereof, and I hereby waive presentation, demand, protest and notice of protest and notice of non payment. Abraham Horovitz."

In the action of foreclosure the defendants were Max Goldberg, Abraham Horovitz, Lea Horovitz, his wife, Abraham Horovitz, as administrator of the estate of Rebecca Goldberg, deceased, and Title Guaranty & Trust Company. The only answer filed was that of Abraham Horovitz, and Lea Horovitz, his wife, and default of all others was duly entered. Subsequently the action was dismissed as to Lea Horovitz.

Rebecca Goldberg, one of the makers of the note, died prior to the commencement of this action, leaving an estate which included the real property encumbered by the mortgage. In the complaint on foreclosure it is set forth that no claim had been filed against the estate of Rebecca Goldberg upon the note and mortgage, and that plaintiff thereby waived all recourse against any property belonging to the estate of Rebecca Goldberg, deceased, other than the mortgaged property, and waived all claim for a deficiency judgment or for costs or counsel fees against the estate, as provided in section 716 of the Probate Code.

Upon the trial in which the only defendant appearing was Abraham Horovitz, individually and as administrator of the estate of Rebecca Goldberg, deceased, a decree was entered awarding to plaintiff as against defendant Horovitz individually the sum of $10,377, being the principal and interest on the note, which he had signed as guarantor. Against Goldberg, the comaker who defaulted, the amount of principal and interest was awarded, together with an additional amount for certain expenditures, attorney fees, and costs. Against the estate of Rebecca Goldberg was awarded the principal and interest found due, certain money expended under the terms of the mortgage, costs, and attorney fees, and ordering the mortgaged property sold to pay such amounts, and for a deficiency judgment against Max Goldberg as maker, and Abraham Horovitz as guarantor, if such deficiency shall occur.

From this judgment and decree, Horovitz, individually and as administrator, appeals.

[1] It is apparently the contention of appellant that, by the waiver of plaintiff of all recourse against the property of the estate of Rebecca Goldberg other than the mortgaged property and the waiver of any deficiency against the estate, thereby Horovitz was discharged of liability under his guaranty. In this, however, plaintiff is in error. In Carver v. Steele, 116 Cal. 116, 47 P. 1007, 1008, 58 Am.St.Rep. 156, where it was claimed the mortgagee by his failure to foreclose his mortgage lien discharged the indorsers of the note, it was held: "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser; even though his passivity in this regard may result in barring his remedy against the original debtor. [Citing cases.] Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by simple failure to enforce his lien against property mortgaged for security of the debt."

In Sichel v. Carrillo, 42 Cal. 493, an action was brought to foreclose a mortgage executed by the husband and his wife upon land which was the separate property of the wife. The notes were executed by the husband alone, and were to evidence the

private obligations of the husband. Before the commencement of the action, the husband died, and the notes were never presented against his estate. The Supreme Court held that, despite the failure to present a claim against the husband's estate, the wife, who stood in the position of a surety, so far as her land was concerned, was not discharged.

In Duerr v. Sloan, 50 Cal.App. 512, 195 P. 475, 478, the court announced the rule: "In any event, the great weight of authority is that the failure of a creditor to file his claim against the estate of the principal debtor does not release the surety." See, also, notes in 25 L.R.A.(N.S.) 139; 50 A. L.R. 1214.

Section 707 of the Probate Code offered an opportunity to Horovitz, if he was so advised, to protect himself by filing a contingent claim against the estate of the principal debtor. The fact that he was the administrator of the estate of Rebecca Goldberg showed he had notice of her death.

[2] The pleadings are not before us, but it is suggested in the brief of respondent that the answer filed by Horovitz failed to plead affirmatively any release by reason of the facts now urged. It is a well-established rule that a guarantor, relying upon a release, must affirmatively plead and prove the facts establishing such release. It cannot be raised for the first time on appeal. Bull v. Coe, 77 Cal. 54, 18 P. 808, 11 Am. St.Rep. 235. It is true, therefore, that if appellant did not properly plead the fact of a release, it cannot now be considered.

[3] Appellant argues that the judgment as entered violates section 716 of the Probate Code, which provides that, if a claim against an estate is not first filed with the clerk or presented to the executor or administrator, no action shall be maintained, except such action may be brought by the holder of a mortgage to enforce the same against the property of the estate, if all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented.

An examination of the decree in so far as it concerns the estate of Rebecca Goldberg indicates some confusion and uncertainty. It provides that the commissioner shall out of the proceeds from the sale first deduct his fees, disbursements, and commissions of sale; next the costs of suit; thirdly, pay to plaintiff the total sum of $11,398.19 for principal, interest, expenditures under the terms of the mortgage and attorney fees, and interest from date of decree.

However, in conformity with the provisions of section 716 of the Probate Code, and also to conform to a stipulation contained in the complaint wherein plaintiff waived all recourse against any property belonging to the estate, other than the mortgaged property, and expressly waived all claim for a deficiency judgment or for costs or counsel fees, the decree should be modified.

It is therefore the order of this court that the judgment appealed from be affirmed, except that portion of the decree pertaining to the liability of the estate of Rebecca Goldberg, which should be modified by directing that the lien on the property of the estate be for the principal sum of the note, any expenditures made under the provisions of the mortgage for the care and preservation of the property, and interest as provided in the note or mortgage, and, as so modified, the judgment is affirmed. Each party to bear their own costs.

We concur: THOMPSON, J.; PLUMMER, J.

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